(19)

No. 99-312-CFX Title: Norfolk Southern Railway Company, Petitioner
v.
Dedra Shanklin, Next Friend of Jessie Guy Shanklin

Docketed: August 20, 1999 Court: United States Court of Appeals for the Sixth Circuit

See also:

Entry	Date	Proceedings and Orders
	Aug 20 1999	Petition for writ of certiorari filed. (Response due September 19, 1999)
	Sep 17 1999	Brief of respondent Dedra Shanklin in opposition filed.
	Sep 28 1999	Reply brief of petitioner Norfolk Southern Railway Co. filed.
	Sep 29 1999	DISTRIBUTED. October 15, 1999
	Oct 18 1999	Petition GRANTED. SET FOR ARGUMENT March 1, 2000. **********
	Nov 22 1999	Order extending time to file brief of petitioner on the merits until December 16, 1999.
	Dec 15 1999	Order extending time for filing respondents' brief on the merits to and including January 28, 2000. Reply brief must be received and filed with this office on or before February 23, 2000.
	Dec 16 1999	Joint appendix filed.
	Dec 16 1999	Brief of petitioner Norfolk Southern Railway Company filed.
	Dec 16 1999	Brief amici curiae of Texas, et al. filed.
	Dec 16 1999	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	Dec 16 1999	LODGING consisting of twenty copies of an article entitled Reassessing the Presumption Against Preemption, submitted by counsel for the amicus Product Liability Advisory.
	Dec 16 1999	Brief amicus curiae of Association of American Railroads filed.
	Dec 17 1999	LODGING consisting of twenty copies of documents submitted by counsel for the petitioner.
	Jan 7 2000	CIRCULATED.
	Jan 14 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Jan 18 2000	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 20 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Jan 20 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument DISTRIBUTED.
	Jan 24 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
	Jan 24 2000	Motion of Solicitor General for leave to participate in

2 pp

No. 99-312-CFX

Entry	Date	Proceedings and Orders
		oral argument as amicus curiae and for divided argument GRANTED.
	Jan 25 2000	Lodging consisting of 20 printed booklets submitted by Association of American Railroads as Amicus Curiae insupport of the petitioner received.
	Jan 28 2000	Brief amici curiae of Angels on Track Foundation, et al. filed.
	Jan 28 2000	Brief amici curiae of Kenneth Heathington, Gary Long, and Howard Anderson filed.
	Jan 28 2000	Brief of respondent Dedra Shanklin, etc. filed.
	Jan 28 2000	Brief amicus curiae of United Transportation Union filed.
	Jan 28 2000	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jan 28 2000	Brief amicus curiae of United States filed.
	Jan 28 2000	Brief amici curiae of North Carolina, et al. filed.
	Feb 1 2000	Motion of Kansas for leave to participate in oral argument as amicus curiae filed.
	Feb 16 2000	Reply brief of petitioner Norfolk Southern Railway Company filed.
	Feb 16 2000	LODGING consisting of twenty bound copies of supplemental material received from counsel for the petitioner and distributed.
	Feb 17 2000	Record filed.
	Feb 17 2000	Record filed.
	Feb 18 2000	Motion of Kansas for leave to participate in oral argument as amicus curiae DENIED.
	Feb 23 2000	Supplemental brief of respondent filed.
	Feb 25 2000	Letter from counsel for the petitioner received and distributed.
	Feb 25 2000	Record filed.
	Mar 1 2000	ARGUED.

Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), when it held, in acknowledged conflict with decisions of three other circuits, that claims of negligence based on inadequate warning devices at a railway grade crossing are not pre-empted even though the warning devices at the crossing were installed with federal funds under a project approved by the federal government.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, the following were defendants but not appellants below: Cincinnati, New Orleans & Texas Pacific Railway Company and Norfolk Southern Corporation.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner declares that its parent company is Norfolk Southern Corporation, and that its subsidiaries are the following:

CONSOLIDATED (MORE THAN 50% OWNED) SUBSIDIARIES OF NORFOLK SOUTHERN CORPORATION AND STATES OF INCORPORATION AS OF MARCH 1, 1999

Agency Media Services, Inc.
Atlantic Acquisition Corporation
Atlantic Investment Company
Norfolk Southern Properties, Inc.
Norfolk Southern Railway Company
Northmont Limited Partnership
NS Crown Services, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
TCS Leasing, Inc.
Thoroughbred Direct Intermodal Services, Inc.
Northern Horizons

Norfolk Southern Railway Company Subsidiaries

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Atlantic and East Carolina Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Chesapeake Western Railway
Cincinnati, New Orleans and Texas Pacific Railway Company, The
Citico Realty Company
Georgia Southern and Florida Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Lamberts Point Barge Company, Inc.
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern International, Inc.
North Carolina Midland Railroad Company, The
Rail Investment Company
Shenandoah-Virginia Corporation
South Western Rail Road Company, The
Southern Rail Terminals, Inc.
Southern Rail Terminals of North Carolina, Inc.

Southern Region Coal Transport, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Norfolk Southern Properties, Inc. Subsidiaries

Alexandria-Southern Properties, Inc.
Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
Carlyle CA Corporation
Carlyle Development Corporation
Charlotte-Southern Corporation
Charlotte-Southern Hotel Corporation
Lambert's Point Docks, Incorporated
NKPI Management, Inc.
Nickel Plate Improvement Company, Inc., The
Norfolk Southern Industrial Development Corp.
Norfolk Southern Tower, L.L.C.
NS-Charlotte Tower Corporation
NS Gas Properties, Inc.
NS Gas Properties, II, Inc.
Sandusky Dock Corporation
Southern Region Industrial Realty, Inc.
Virginia Holding Corporation

Incorporated Subsidiaries Where Stock Not Yet Sold

Thoroughbred Technology and Communications

In addition, NS also owns:

Conrail Inc.
Consolidated Rail Corporation and its consolidated subsidiaries
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Green Acquisition Corp.
New York Central Lines LLC
Pennsylvania Lines LLC and its subsidiaries.

NORFOLK SOUTHERN CORPORATION

Affiliated and/or Leased Companies (50% or Less Owned) or Partnerships

Ace Insurance Company
Algers, Winslow and Western Railway Company
Amtech Logistics Corporation
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Belt Railway Company of Chicago, The
CK-Southern Associates
CK-Southern Associates #2 L.P.
CK Southern Associates #3, L.L.C.
CNS Limited Partnership
Carlyle Towers, L.L.C.
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chesapeake Crossing Seniors Community One, L.P.

Chesapeake Crossing Seniors Community Two, L.P.
Consolidated Rail Corporation
Conrail Inc.
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Fiberow Partnership
1575 Eye Street Associates (Limited Partnership)
Florida East Coast Industries, Inc.
Gateway Institutional Tax Credit Fund Ltd.
Gilbert NS Lumber, LLC
Gilbert-PLC Lumber Co.
Gilbert Pocahontas, L.L.C.
Glenwood Square Shopping Center Associates, L.L.C.
Green Acquisition Corp.
Green Real Estate Company
High Point, Thomasville & Denton Railroad Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Martiki-Pocahontas Partnership
Midland Corporate Tax Credit Ltd.
North Charleston Terminal Company
Pace Carbon Synfuels Investors, L.P.
Peoria and Pekin Union Railway Company
Pine Brook Center Limited Partnership
Railbox Company
Railgon Company
700 North Fairfax Street Limited Partnership
Southeast Banking Corporation
Stonebridge Manor Apartments, L.P.
TTX Company
Terminal Railroad Association of St. Louis

Three Commercial Place Associates
Triple Crown Services Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Norfolk Southern Railway Company ("Norfolk Southern") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 173 F.3d 386 (Appendix to Petition for Certiorari ("App.") 1a-25a). The opinion and order of the United States District Court for the Western District of Tennessee denying summary judgment to petitioner is unreported (App. 26a-37a).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1999. A petition for rehearing was denied on May 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e) and 130 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) (App. 40a-45a). The regulation at issue is 23 C.F.R. § 646.214 (App. 46a-47a).

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court unanimously held that federal regulations that prescribe rules for designing "[a]dequate warning devices" installed with federal funds at railway-highway crossings, 23 C.F.R. § 646.214 (emphasis omitted), pre-empt state tort law claims against railroads alleging the inadequacy of those devices. In the years following, the majority of courts of appeals and state supreme courts have been faithful to *Easterwood*, and have adopted a bright-line rule that inadequate-device tort claims are pre-empted where federal funds participated in the installation of warning devices under a project approved by the Federal Highway Administration ("FHWA").[1] The courts of appeals for the Sixth and

[1] *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 864-65 (11th Cir. 1998); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Hatfield* v. *Burlington N. R.R. Co.*, 64 F.3d 559, 562 (10th Cir. 1995); *Bock* v. *St. Louis Southwestern Ry. Co.*, No. 97-4076, 1999 WL 437240, at *2-*3 (8th Cir. June 30, 1999); *Bryan* v. *Norfolk & W. Ry. Co.*, 154 F.3d 899, 903 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 921 (1999); *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241, 244-45 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

Seventh Circuits, however, have refused to give *Easterwood* a "literal reading." *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 306-07 (7th Cir. 1994); App. 11a-12a. Those courts have engrafted onto *Easterwood* an additional, unfounded prerequisite to pre-emption: namely, that specific evidence be presented that the FHWA evaluated the conditions of a particular crossing and made an independent, site-specific determination as to whether the state agency has selected the proper warning device. See App. 13a-14a; *Shots*, 38 F.3d at 307-09. This Court should resolve this deep and mature 6-2 split among the circuits and state supreme courts on a federal law question that is important to the national uniformity of railroad safety law.

1. *Statutory And Regulatory Background.*

The safety of public railway-highway grade crossings[2] has long been a matter of federal concern. From the inception of the Federal Aid Highway Act, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress has authorized federal funds for States to use in improving those crossings. See Federal Highway Administration, U.S. Dep't of Transportation, *Rail-Highway Crossings Study* 1-8 (1989) ("*1989 Crossings Study*"). From as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secre-

[2] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

tary [of Transportation] at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[3]

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[4] enacted the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971.[5] The purpose of the FRSA was "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of

[3] Such provisions served not only to protect motor vehicle drivers and passengers, but the railroads and their passengers: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, Chattanooga, & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

[4] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[5] The FRSA was originally codified at 45 U.S.C. §§ 421 to 444. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22. Even though the events in question in this case took place before the 1994 recodification, this petition will use the current Title 49 citations for the FRSA provisions.

Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Easterwood*, 507 U.S. at 662. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force any law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Easterwood*, 507 U.S. at 662.

In the FRSA, Congress expressed special concern about railway crossing safety, and it mandated that the Secretary report on the current state of the problem and make recommendations for solving it. See FRSA, § 204, 84 Stat. at 972; Highway Safety Act of 1970, Pub. L. No. 91-605, § 205(a), 84 Stat. 1739, 1742; *Easterwood*, 507 U.S. at 661-62. In his report, the Secretary called for expanded federal funding to the States to install protective devices at public crossings, and underscored the need for passive warning devices even where active devices (such as gates and flashing lights) were not justified. *1972 Crossings Report*, at i-vi.

Congress responded to the Report by enacting section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[6] This statute specifically grants States federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States "must survey all highways" to identify

[6] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d).

Soon after the passage of the 1973 Act, the FHWA promulgated regulations to govern federal aid projects "for the elimination of hazards of railway-highway crossings." 23 C.F.R. § 646.200(b); see Reimbursement for Railroad Work and Railroad-Highway Projects, 40 Fed. Reg. 16,057, 16,059 (Apr. 9, 1975).[7] In addition to the general regulations governing state programs for evaluating railway crossing hazards and developing remedial projects, see 23 C.F.R. pt. 924, the FHWA made States "subject to further regulations governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666-67. For all federally funded projects, the States "*must employ* devices that conform to standards set out in FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or Manual)." *Id.* (emphasis added); 23 C.F.R. § 646.214(b)(1). Although it imposes certain requirements if special conditions are present, the MUTCD imposes only one mandatory requirement for all grade crossings: namely, that on each roadway approach to the crossing, there must be one reflectorized "crossbuck sign" (*i.e.*, the traditional X-shaped sign with the words RAILROAD CROSSING on crossed panels). Federal Highway Administration, U.S. Dep't of Transportation, *Manual on Uniform Traffic Control Devices for Streets and Highways* 8B-1 (1988) ("*MUTCD*").

In addition to requiring MUTCD compliance, the FHWA regulations also prescribe what will constitute "[a]dequate warning devices," 23 C.F.R. § 646.214(b)(3)(i) (emphasis omitted), on federal-aid highway projects, see *id.* § 646.214(b)(2), or where "Federal-aid funds participate in the installation of the devices," *id.* § 646.214(b)(3)(i). For enumerated high-risk crossings—such as crossings with multiple tracks, high speed trains operating in areas of limited visibility, or heavy vehicle or train traffic—the FHWA prescribes that only devices that include "automatic gates with flashing light signals" will suffice, unless the FHWA finds otherwise based on diagnostic-team recommendations. *Id.* § 646.214(b)(3)(i), (ii). For all other crossings, the "type of warning device to be installed . . . is subject to the approval of FHWA." *Id.* § 646.214(b)(4). See *Easterwood*, 507 U.S. at 666-67.

[7] The Secretary delegated his statutory power to administer the Acts in question to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

The procedures for FHWA approval of federal-aid projects, such as the federally-funded installation of warning devices, are set forth in 23 C.F.R. pt. 630. Cf. *id.* § 646.216(a) (general procedures for federal-aid projects apply to railway crossing projects "[u]nless specifically modified herein"). Those regulations prescribe that project "[a]uthorization can be given only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied"—including the requirement in 23 U.S.C. § 109(e) that railway crossing devices are "adequate." *Id.* § 630.106(a).[8] For every project, the State must submit "plans, specifications, and estimates (PS&E), and supporting documents," *id.* § 630.201, the contents of which are determined by the FHWA, *id.* § 630.205(a). Those plans and specifica-

[8] Although the regulations in current form were promulgated in 1996, *see* Federal Aid-Project Authorization, 61 Fed. Reg. 35,629, 35,632 (July 8, 1996), they are the same in substance as the ones that existed at the time of the project approval in this case. *Id.* at 35,630 (indicating no substantive change intended). The regulation in effect at the time of the TDOT (*see infra* p. 8) project approval specifically indicates that authorization of funding required approval of the adequacy of warning devices. *See* 23 C.F.R. § 630.114(b) (1988).

tions must "describe the location and design features and construction requirements in sufficient detail" for FHWA evaluation. *Id.* § 630.205(b). They are submitted to the FHWA "for approval," *id.* § 630.205(c), and the project shall not be advertised for bid or commenced until the plans "ha[ve] been approved by the FHWA and the [State] has been so notified." *Id.* § 630.205(e).

2. *The Tennessee Crossing Program Under The Highway Safety Act.*

The Tennessee Department of Transportation ("TDOT") instituted a crossing program under 23 U.S.C. § 130(d) to survey the more than 3,400 public grade crossings in the State and, using sophisticated computer modeling that considers more than 50,000 factors, to rank those crossings in terms of relative hazard. C.A. App. 311-12. A diagnostic team of highway engineers is assembled to go to priority crossings and determine what warning devices (active or passive) are appropriate. *Id.* at 313-14.

Tennessee has also implemented what it has designated as its "minimum protection program," C.A. App. 315, even though it goes far beyond the federal MUTCD minimum of two reflectorized crossbucks, one on each approach to a crossing. Cf. *MUTCD*, at 8B-1. Tennessee has mandated there will be "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would take it." C.A. App. 315.[9]

In 1987, TDOT surveyed 196 crossings in West Tennessee as part of this program, and sought federal funding

[9] The Tennessee minimum protection program in effect uses the full panoply of passive warning devices, other than those which are used or permitted only in the presence of special conditions. *See 1989 Crossings Study*, at 4-2 to 4-4.

to install any devices necessary to bring those crossings into compliance with the aforementioned program standard. On April 2, 1987, the FHWA Division Administrator for Tennessee authorized the project to proceed, and on June 2 of that year TDOT entered into a project agreement with the FHWA to spend $128,848 of federal funds on those crossings (which represented 99% of the project cost). C.A. App. 488.

One such crossing was the Oakwood Church Road crossing in rural Gibson County, where TDOT's contractor removed existing crossbucks and installed reflectorized crossbucks and three advanced warning signs on that public road.[10] C.A. App. 317, 488.[11] An FHWA engi-

[10] The placement of the three signs and crossbucks at the Oakwood Church Road crossing shows that, despite the numerous crossings in the federally funded project, due attention was given by the governmental authorities to the upgrade needs of each individual crossing.

[11] To ensure that crossing evaluations are not impeded by litigation concerns, Congress has prohibited the discovery or admission as evidence in any federal or state court proceeding of

> reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of [Title 23] or for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds.

23 U.S.C. § 409 Thus, there is no discoverable or admissible evidence of what data or documentation was submitted in support of TDOT's 1987 application for federal funds.

Although it is possible to identify Oakwood Church Road as one of the crossings at which warning devices were installed in this project, section 409 bars discovery of its rank in the Tennessee crossing-hazard index, or of any possible analysis of the crossing by a TDOT diagnostic team. *See* C.A. App. 314-15 (refusal of TDOT official to divulge that information).

neer inspected the project by visiting a sample of the crossings (although not Oakwood Church Road) over a two-day period in November 1987, and certified its completion. *Id.* at 474, 492. On December 11, 1989, the FHWA paid its 99% share of the project cost to TDOT. *Id.* at 493. Thus, federal funds paid for the installation of warning devices at the Oakwood Church Road crossing in Gibson County, Tennessee.

3. *This Litigation.*

On October 3, 1993, Eddie Shanklin was killed in a train collision at the Oakwood Church Road crossing as he was driving to work from his home nearby. Respondent Dedra Shanklin, his widow, brought a wrongful death action under Tennessee statutory and common law against petitioner. She alleged various bases of tort liability, including that petitioner was negligent in failing to install adequate warning devices at the crossing. See App. 2a.

A principal issue both at trial and on appeal was whether, under this Court's decision in *Easterwood*, the FRSA pre-empted respondent's inadequate-device state tort law claim. In *Easterwood*, this Court declared that the federal regulations defining "adequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) did "cover[] the subject matter of," 49 U.S.C. § 20106, state tort law requiring due care in the selection of warning devices. 507 U.S. at 670.[12] Those regulations, this Court held, "displace state and private decisionmaking authority by establishing a federal-law requirement that certain pro-

[12] FRSA pre-emption applies to any rule, regulation, or standard issued by the Secretary of Transportation that relates to railroad safety, and not just those issued under the authority of the FRSA *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993). As this Court noted in *Easterwood*, however, 23 C.F.R. § 646.214(b)(3) and (4) were promulgated in part under the FRSA. *Id.*

tective devices be installed or federal approval obtained." *Id.* The only possible involvement of railroads envisioned by subsection (b)(3) is "their participation in diagnostic teams which may recommend the use or nonuse of crossing gates." *Id.* at 671.[13] That subsection further limits state and railroad decisionmaking by requiring automatic gates with flashing light signals for particular high-risk crossings, *id.* at 670, absent FHWA waiver, 23 C.F.R. § 646.214(b)(3)(ii). Subsection b(4) in turn makes any other initial determination of warning devices "subject to the Secretary's approval." 507 U.S. at 671. The Court accordingly stated a bright-line test for federal pre-emption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. (emphasis added). The *Easterwood* Court found no pre-emption in the case before it only because the regulations did not apply: *i.e.*, federal funds did not participate in the installation of the devices in question, *id.* at 673, and it was not contended that the project was part of a federal-aid highway project, *id.* at 670 n.10.

Despite the clarity of *Easterwood*, and the clear majority rule among the courts of appeals that pre-emption of inadequate-device tort claims occurs whenever federal funding is approved for a project, see *supra* n.1, the dis-

[13] Some States, like Tennessee, do not allow railroad personnel on their diagnostic teams.

trict court denied petitioner's pre-emption defense on summary judgment. App. 36a-37a. Accordingly, the district court instructed the jury that petitioner's duty to exercise reasonable care in warning motorists of an oncoming train "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." C.A. App. 412. The jury found negligence on the part of both petitioner and the deceased, and assessed damages at $615,379. Because the jury assigned 70% of the negligence to petitioner, judgment was entered against petitioner for $430,765.30.

On appeal, the Sixth Circuit affirmed. It squarely and explicitly rejected the holdings of three other courts of appeals (the Fifth, Eighth, and Tenth Circuits) that "federal funding is both a necessary and sufficient condition for the preemption of state law" under *Easterwood*. App. 9a. Instead, it sided with the Seventh Circuit, and adopted that court's two-part test for *Easterwood* pre-emption: (1) whether federal funds participated in the installation of the devices in question, and (2) whether FHWA "actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)." *Id.* at 13a (citing *Shots* v. *CSX Transp.*, 38 F.3d 304, 307-09 (7th Cir. 1994)).

The Sixth Circuit further rejected the argument that funding constitutes approval, even though by statute and regulation no funds can be approved unless safety devices comply with FHWA standards, 23 U.S.C. § 109(e); 23 C.F.R. § 630.106(a); the court reasoned that those provisions do no more than restate the requirements of 23 C.F.R. § 646.214(b)(3) and (4). App. 19a. Finally, it dismissed the argument that the statutory prohibition on discovery of "reports, surveys, schedules, lists, or data"

regarding crossing safety enhancements, 23 U.S.C. § 409, prevented railroads from raising pre-emption defenses under the Sixth and Seventh Circuits' approach. In the court's view, the necessary evidence that FHWA approved "of the use of passive warning devices at a particular crossing is not barred from discovery or admission into evidence by § 409." App. 22a. The Sixth Circuit stated that it was petitioner's burden to show, not only that the FHWA authorized federal funds to install protective devices, but also that the FHWA specifically evaluated the Oakwood Church Road crossing and approved the passive warning devices placed there as adequate for that crossing. Absent that proof, there would be no pre-emption. *Id.*

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE A DEEP AND MATURE 6-2 SPLIT AMONG THE COURTS OF APPEALS AND STATE SUPREME COURTS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

The resolution of conflicts among the federal courts of appeals and the state courts of last resort on an issue of federal law is one of the primary justifications for this Court to grant certiorari. See Sup. Ct. R. 10. On the question presented, there is a deep (6-2), acknowledged, and clean split among the lower courts, and this Court should resolve the important and recurring question of the requirements for pre-emption of inadequate-device state tort law claims.

The majority of federal courts of appeals and state supreme courts have properly followed this Court's command that, when the provisions of 23 C.F.R. § 646.214 (b)(3) and (4) "*are applicable*, state tort law is pre-empted." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 670 (1993) (emphasis added). It is beyond dis-

pute that those regulations are "applicable" whenever, upon FHWA project approval, "[f]ederal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i). Thus, as the Eighth Circuit has held, "[f]ederal funding is the touchstone of preemption in this area." *Bock* v. *St. Louis Southwestern Ry. Co.*, No. 97-4076, 1999 WL 437240, at *2 (8th Cir. June 30, 1999) (internal quotation marks omitted). *Accord Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996) ("In light of *Easterwood* . . . the issue in this case is whether federal funds participated in some significant way in the installation of warning devices at [a particular] crossing before . . . the date of the accident."); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995) ("Pursuant to *Easterwood*, the test we must apply is whether federal funds 'participated' in the installation of 'warning devices' at the . . . crossing. If they have, the . . . common law claims based on inadequate signalization are preempted."); *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998) (same); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997) (same); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997) (same).

Under *Easterwood* and the majority rule, pre-emption therefore depends on one element: the applicability of regulations that cover the subject matter of state law. The regulations themselves are pre-emptive because they "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Easterwood*, 507 U.S. at 670. When a crossing is governed by 23 C.F.R. § 646.214(b)(4), as here, pre-emption flows from the regulatory mandate that selection of warning devices in federal aid projects shall be "subject to the Secretary's approval." *Easterwood*, 507 U.S. at 671. Thus, " 'the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands.' " *Bock*, 1999 WL 437240, at *2 (quoting *Armijo*, 87 F.3d at 1192) (alteration omitted). The FHWA has the final authority to determine the selection of warning devices, and its authorization of federal funding for passive warning devices is "tantamount to a determination . . . that only passive, rather than active, warning devices [a]re sufficient." *Armijo*, 87 F.3d at 1190. The contrary approach of the Sixth and Seventh Circuits is at odds with the FRSA scheme: pre-emption does not depend on whether a federal "regulation or . . . order cover[s] the subject matter of the State requirement," 49 U.S.C. § 20106, but on whether there is specific evidence that an FHWA official complied with the regulations. See App. 13a-14a; *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307-09 (7th Cir. 1994).

The majority-rule courts have uniformly and expressly rejected the *Shots* approach. See, *e.g.*, *Ingram*, 146 F.3d at 864-65; *Armijo*, 87 F.3d at 1191; *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241, 244 (8th Cir. 1995); *Hester*, 61 F.3d at 387 n.9. Now the Sixth Circuit has expressly sided with the Seventh Circuit and squarely rejected the majority rule. App. 17a ("We think it is illogical to read *Easterwood*[] as the Fifth, Eighth, and Tenth Circuits have done.").

There is thus now a clean and acknowledged circuit split on an issue, as the Sixth Circuit remarked, that is of great importance to railroads and plaintiffs alike. App. 17a-18a. The split is deep, and there are numerous opinions (sometimes multiple ones within a circuit) upon

which this Court may draw in resolving the issue. In sum, this question is ripe for the Court's review.

II. IMMEDIATE RESOLUTION OF THE QUESTION PRESENTED IS CRITICAL TO THE CONGRESSIONAL GOAL OF NATIONAL UNIFORMITY IN RAILWAY SAFETY LAW AND TO THE ADMINISTRATION OF THE FEDERAL CROSSINGS PROGRAM.

Even aside from the clear conflict in the lower courts, this Court should grant certiorari because of the need for "a uniform rule on the point." *Commissioner* v. *Bilder*, 369 U.S. 499, 501 (1962). In our system of federalism, it is inherently untenable for the law of some States but not others to be pre-empted. Respect for the dignity of the States demands that federal law treat them equally. Moreover, the disuniformity bred by the Sixth Circuit's decision is contrary to congressional policy that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, this Court should act now to resolve the question presented and define a single national pre-emption rule.

The need for this Court's review is all the more urgent because of the implications of the Sixth Circuit's decision for the proper administration of the Section 130 crossing program. That program has been a resounding success. Federal funds have accounted for most of the $3 billion expended on grade crossing safety involving nearly 30,000 projects between 1974 and 1995. Federal Highway Administration, U.S. Dep't of Transportation, *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* (Mar. 1, 1996) <http://www.fhwa.dot.gov/omc/contents.htm>, at 3 ("*1996 Task Force Report*"). Despite increased highway and rail traffic, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: there were more than 12,000 accidents and 1,500 fatalities at railway crossings in 1972, but only 3,865 accidents and 461 fatalities in 1997. *Id.*; Federal Railroad Administration, U.S. Dep't of Transportation, *Railroad Safety Statistics Annual Report 1997* 2-2 (1998) (Table 2-1) ("*1997 Safety Report*"). The FHWA has "estimated that since its inception, the Section 130 Program has helped save almost 9,000 lives and prevent nearly 40,000 injuries." *1996 Task Force Report*, at 3.

A principal reason for the success and cost-effectiveness of the section 130 program has been the requirement (supported by federal funds, see 23 C.F.R. § 924.9(c)) that the States perform systematic crossing surveys and data collection and analysis, and develop processes for conducting engineering studies and prioritization of remedial projects based on relative hazard, accident reduction potential, and cost. See 23 U.S.C. § 130(d); 23 C.F.R. § 924.9(a)-(b). The thrust of the section 130 program, and the pre-emptive 1975 FHWA regulations defining federal standards and procedures for ensuring the adequacy of warning devices selected by the State, has been to make the installation of federally funded warning devices a matter of rational, expert determination based on hard evidence and scientific analysis—rather than the vagaries of tort judgments by lay jurors in the aftermath of a fatality against the only entity normally capable of being sued (the railroad), in trials where all the evidence and analyses relied upon by the experts in selecting devices for that crossing are excluded by operation of law, see 23 U.S.C. § 409. See *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

The approach of the Sixth and Seventh Circuits cannot reasonably be administered, and subjects railroads to arbitrary judgments. The bright-line majority rule clearly reflects the reasonable scheme of the FHWA's 1975 adequate-device regulations, as verified by *Easterwood*: when the FHWA approves installation of the devices with federal funds, the crossing is in effect "federalized" and any state-law duty of the railroad to determine the adequacy of warning devices is pre-empted; the railroad's involvement is limited to participation in a diagnostic team that the State may assemble for a crossing, *Easterwood*, 507 U.S. at 671, but only if such participation is invited by the State. Cf. *MUTCD*, at 8D-1 ("The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations."). After the federally funded devices are installed, it is the State that has the duty under the section 130 crossing program to monitor the crossing to determine if additional devices are needed, and to schedule any required upgrade projects. This scheme is sound public policy: each entity is at all times aware of its responsibility for protecting the public, and is not left to litigate an alleged responsibility at some indefinite future time after someone is killed or injured.

Under the rule of the Sixth and Seventh Circuits, however, railroads are now not only subject to tort actions for the alleged inadequacy of devices selected by the State and funded by the FHWA, but are also precluded by 23 U.S.C. § 409 from discovering or introducing into evidence any of the data, reports, or surveys that might prove that reasonable care was used in the selection of the devices. The Sixth Circuit purports to preserve a pre-emption defense for railroads of introducing specific evidence of FHWA approval of a device at a particular crossing. See App. 13a-14a. But such crossing-specific

evidence does not generally exist because the device approvals are subsumed within the FHWA authorization of federal funding for the devices—which, by statute and regulation, cannot be given without approving the adequacy of the devices. See 23 U.S.C. § 109(e) ("no funds shall be approved . . . unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation"); 23 C.F.R. § 630.106(a); *Hester*, 61 F.3d at 387. If the rule of the Sixth and Seventh Circuits stands, railroads can only defend themselves by engaging in wasteful duplication of the States' survey and hazard analyses of the nation's more than 160,000 public grade crossings, *1997 Safety Report*, at 9-2 (Table 9-2). This is contrary to reason and the federal scheme that Congress crafted. Given the importance of the Sixth and Seventh Circuits (the States of which contain 15% of the nation's public crossings, *id.*, often on heavily traveled roads), and the deep conflict among the lower courts, this Court should decide the question presented now.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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August 20, 1999

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 96-6371

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Plaintiff-Appellee,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant,

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY;
NORFOLK SOUTHERN CORPORATION,
Defendants.

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
No. 94-01212—James D. Todd, District Judge.

Argued: February 5, 1998
Decided and Filed: April 13, 1999

Before: BATCHELDER, MOORE, and CLAY, Circuit Judges.

OPINION

ALICE M. BATCHELDER. This action arises out of an accident that occurred in Gibson County, Tennessee, on October 3, 1993. Eddie Shanklin collided with, and was killed by, one of Norfolk Southern's trains while he was driving his car east across the Oakwood Church Road Crossing. Dedra Shanklin (Eddie Shanklin's widow) brought claims—based on both Tennessee common law and statutory law—alleging that the accident was the result of Norfolk Southern's negligence in: (1) operating its train at an excessive speed; (2) failing to sound the horn or apply the brakes in a timely fashion; (3) failing to remove vegetation from the area surrounding the crossing; (4) failing to install a "ditch light" on the train; and (5) failing to install adequate warning devices at the crossing.

Norfolk Southern moved for summary judgment, claiming that Shanklin's claims are preempted by the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §§ 421-447, *repealed and recodified as* 59 U.S.C. §§ 20101-20153. On April 17, 1996, the district court granted summary judgment to Norfolk Southern on the excessive speed and "ditch light" claims, holding that they were preempted by the FRSA and Boiler Inspection Act, respectively, but denied the motion in all other respects.

Thus, the claims concerning failure to apply the brakes, failure to sound the horn, failure to remove vegetation, and failure to install adequate warning devices went to a jury trial beginning on April 29, 1996. On May 7, 1996, the jury returned a verdict finding that Shanklin and Norfolk Southern were both guilty of negligence. The jury assigned 30% negligence to Shanklin and 70% to Norfolk Southern. The jury further found the damages to be $615,379.00. Accordingly, a judgment was entered by the district court awarding Shanklin $430,765.30.

Norfolk Southern timely filed a motion for judgment as a matter of law or, in the alternative, for a new trial. The motion was denied on September 13, 1996, and Norfolk Southern timely filed a notice of appeal on September 25, 1996.

I.

A.

In 1987, the Tennessee Department of Transportation ("TDOT") installed reflectorized crossbucks at the Oakwood Church Road Crossing as part of an improvement project including 196 crossings in 11 West Tennessee counties. Terry Cantrell, the TDOT employee in charge of Tennessee's railroad crossing programs, testified that the improvements at the Oakwood Church Road Crossing were undertaken as part of a federally funded "minimum protection program" to bring crossings into compliance with 23 C.F.R. § 130(d). That section mandates that a state establish a schedule of crossing safety projects and that "[a]t a minimum, such schedule shall provide signs for all railway-highway crossings." 23 U.S.C. § 130(d). No evidence was produced that any federal employee was involved in the decision to install crossbucks, as opposed to active warning devices such as gates and flashing lights, at the Oakwood Church Road Crossing.

Furthermore, evidence was introduced at trial showing that the Oakwood Church Road Crossing exhibited the following dangerous conditions: (1) high speed train operations combined with limited sight distance; (2) moderately high railroad and highway traffic; (3) trucks carrying hazardous materials; and (4) a prior collision at the crossing.

B.

Eddie Shanklin was driving east along Oakwood Church Road at a speed of 20 miles per hour when he was struck

by a Norfolk Southern train at the Oakwood Church Road Crossing. Archie Brunham, former head of the Georgia Department of Transportation, explained at trial that Shanklin did not have enough time to stop the car after seeing the train and that he was not able to hear the train whistle because his windows were rolled up, his heater fan was on, and his radio was playing. Burnham explained that in order to stop, Shanklin needed to have seen the train and to have started applying the brakes no closer than 135 feet from the tracks. Shanklin could not have seen the train until he was a mere 94 feet from the tracks, however, because of vegetation and the proximity of a house to the tracks. Indeed, the engineer of the train testified that he never saw Shanklin's vehicle prior to the accident, and the other two crew members testified that they only saw Shanklin's car after it was too late to stop.

Burnham also testified that "very possibly sight and sound of the approaching train could have been received by Shanklin at the same point in time. And as I've demonstrated earlier that point in time, 94 feet away from the rail, is just too late." When Norfolk Southern tried to rebut Burnham's horn-related testimony with an expert of their own, the results were less than stellar. Tom Rose opined that the train horn could have been heard at 400 feet, but he reached that opinion by doing tests in a car different from Shanklin's, without radio or heater on, and sitting still on a flat road in Texas. Rose played a tape recording at trial, which he expected would establish that Mr. Shanklin would have been able to hear the train horn. The demonstration, however, was not very successful. At one point, Rose apologized:

> I have a little egg on my face, as you heard . . . the recording, as you can tell, is terrible. It's extremely muddy. There was a malfunction, but I think you can still tell that the horn is—you can tell the horn is there sometimes and not there at others.

Expert testimony further suggested that the headlamp on the train may have been inadequate to warn Shanklin of the train's approach. Burnham pointed out how the existence of street lights along the tracks could confuse a driver into thinking that the train's headlamp was just another street light. Burnham further testified that the headlamp on Norfolk Southern's train was designed "to give indication of the illumination in front of the train as opposed to being a warning to the traffic that here comes the train."

II.

A.

Norfolk Southern contends that Shanklin's state law crossing warning device claim was preempted by the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434), and regulations issued under the Highway Safety Act, 23 U.S.C. § 101 *et seq.*

The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. As an aid to developing solutions to safety problems posed by railroad grade crossings, the FRSA provides that the Secretary of Transportation "as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing [existing] laws and regulations." 49 U.S.C. § 20103.

Not long after enacting the FRSA, Congress enacted the Highway Safety Act of 1973, which makes federal funds available to the states to improve grade crossings. As a prerequisite to receiving federal funds, a state must "conduct and systematically maintain a survey of all high-

ways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d). States may have to meet other requirements, as specified by regulations promulgated by the Secretary through the Federal Highway Administration ("FHWA") under the FRSA and the Highway Safety Act. *See* 23 C.F.R. pts. 646, 655, 924, 1204.

The FRSA specifically provides for preemption, stating:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106.

In *CSX Transportation, Inc. v. Easterwood*, the Supreme Court addressed the preemptive force of the FRSA with respect to state warning device claims for accidents at grade crossings. 507 U.S. 658 (1993). Very much like the present case, the plaintiff in *Easterwood* had been killed by one of defendant's trains at a grade crossing. Easterwood's widow brought a state tort claim for failure to maintain adequate warning devices at the crossing. The Supreme Court held that the state law claims in that case were not preempted by the FRSA.

The *Easterwood* Court first held that the regulations contained in 23 C.F.R. §§ 646.214(b)(3) and (4) provided the only potential sources for preemption in the circumstances of that case. Those sections apply, however, only to grade crossings in which "Federal-aid funds participate in the installation of the [warning] devices."

See 23 C.F.R. §§ 646.214(b)(3) and (4). With respect to such federally funded crossings or federally funded projects to improve or create such crossings, § 646.214 (b)(2) states that "the crossing shall not be opened for unrestricted use by traffic or the project accepted by the FHWA until *adequate warning devices* for the crossing are installed and functioning properly." 23 C.F.R. § 646.214(b)(2) (emphasis added).

Subsections (b)(3) and (4) outline the types of warnings deemed *adequate* for certain types of crossings. Subsection (b)(3)(i) mandates that automatic gates with flashing lights be installed at all grade crossings where one or more of the following conditions exists:

> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
>
> (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
>
> (F) A diagnostic team recommends them.

23 C.F.R. § 646.214(b)(3)(i). Subsection (b)(3)(ii) further provides that "[i]n individual cases where a diagnostic team justifies that gates are not appropriate, FHWA

may find that the above requirements are *not applicable*." 23 C.F.R. § 646.214(b)(3)(ii) (emphasis added). If the requirements of (b)(3) are not applicable, then (b)(4) applies. According to subsection (b)(4), "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is *subject to the approval of FHWA*." 23 C.F.R. § 646.214(b)(4) (emphasis added).

Taken together, then, subsections (b)(3) and (4) make it clear that there are only two types of crossings for which some federal funds have been used to supply warning devices: those that require active warnings, and those for which the absence of active warnings has been approved by the FHWA. In other words, a crossing must have active warning devices (*e.g.*, automatic gates and flashing lights), unless the crossing falls under one of two exceptions: (1) a diagnostic team analyzes the crossing and determines that no active warning devices are needed, or (2) none of the dangerous conditions listed in (b)(3) exists at that crossing. If either of the exceptions applies, however, the crossing cannot be in compliance with subsection (b)(4) until the passive warnings adopted for the crossing have been approved by the FHWA. Accordingly, the *Easterwood* Court held that subsections (b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. Indeed, [these sections] effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670.

The state law claims were not preempted in *Easterwood*, however, because the facts of that case failed to

establish the preconditions for the application of either subsection (b)(3) or (b)(4). Specifically, the record failed to "establish that federal funds 'participate[d] in the installation of the [warning] devices.'" *Id.* at 672 (brackets in original). State law is preempted only if either subsection (b)(3) or (b)(4) applies, and those subsections apply only if federal funds participated in the installation of warning devices at a particular crossing. Because federal funding was absent in *Easterwood*, the state law claim was not preempted.

Courts have not uniformly interpreted the holding in *Easterwood*. The Fifth, Eighth, and Tenth Circuits have each interpreted *Easterwood* to hold that federal funding is both a necessary and a sufficient condition for the preemption of state law. *See Armijo v. Atchison, Topeka and Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996) ("In light of *Easterwood* . . . the issue in this case is whether federal funds participated in some significant way in the installation of warning devices at [a particular] crossing before . . . the date of the accident."); *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995) ("Pursuant to *Easterwood*, the test we must apply is whether federal funds 'participated' in the installation of 'warning devices' at the . . . crossing. If they have, the . . . common law claims based on inadequate signalization are preempted."); *Elrod v. Burlington N. R.R. Co.*, 68 F.3d 241, 244 (8th Cir. 1995) ("Federal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators."). Although *Hester* and *Elrod* dealt with (b)(4), rather than (b)(3) crossings, the opinions in those cases leave little room for doubt that the analysis would be the same in (b)(3) cases. Put simply, these circuits find that preemption analysis begins and ends with the federal funding question.

The Seventh Circuit, on the other hand, has interpreted *Easterwood* to hold that preemption analysis begins, but does not end, with the federal funding issue. See Shots v. CSX Transp., 38 F.3d 304 (7th Cir. 1994). The *Shots* Court framed the discussion by first asking "what if anything more must be shown besides federal financial assistance to knock out a state common law or statutory safety requirement for grade crossings . . . ." *Id.* at 305. Judge Posner, writing for the Seventh Circuit in *Shots*, found it significant that the *Easterwood* Court never got around to enumerating additional requirements for preemption, because the threshold requirement, federal funding, was absent in that case. *Id.* at 307. Judge Posner correctly noted that there is a difference between holding that federal funding is a necessary condition to preemption and holding that federal funding is a sufficient condition. *Id.*

Despite reaching different conclusions, the courts interpreting *Easterwood* have all focused on the same passage from that opinion:

> In either case [(b)(3) or (b)(4)], the Secretary has determined that the railroads shall not be made to pay any portion of installation costs. In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which . . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 507 U.S. at 671 (internal citation omitted). *See Shots*, 38 F.3d at 306-07 (quoting the above passage as critical to understanding of the holding in *Easterwood*); *Hester*, 61 F.3d at 386 (same); *Elrod*, 68 F.3d at 243-44 (citing the page from *Easterwood*, but not quoting the passage; also citing to the discussion of that passage in *Hester*); *Armijo*, 87 F.3d at 1190 (citing the page from *Easterwood*, but not quoting the passage).

Based on this language from *Easterwood*, the Fifth, Eighth, and Tenth Circuits all agree that "the Secretary of Transportation's authorization of passive warning devices was tantamount to a determination . . . that only passive, rather than active, warning devices were sufficient." *Armijo*, 87 F.3d at 1190. These courts reason that federal law preempts state law at a particular crossing once the Secretary has made a determination of the kinds of warning devices that are needed at that crossing. Federal funding is merely a proxy for such a determination; *i.e.*, federal funding equals a constructive determination by the Secretary that the types of devices being funded are adequate for the crossing being funded. Once devices for which there is any federal funding have been installed, the argument goes, state law ceases to apply. As the *Hester* Court put it, "The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices being installed were adequate to their task." 61 F.3d at 387.

With respect to the same passage from *Easterwood*, however, the Seventh Circuit stated:

> Read literally, as a blanket statement that the regulation prescribes *the* safety devices for all crossings at which federal funds have been used for the installation of some safety device, this passage supports the railroad's position. But we do not think the literal

> reading is the correct one. The regulation does not specify particular safety devices at particular crossings. Rather, it establishes criteria for determining which safety devices are required at particular crossings. Because the Supreme Court in *Easterwood* found that federal funds had not participated in the project at issue in that case, it had no occasion to consider the application of the regulation to particular crossings.

Shots, 38 F.3d at 307. According to the Seventh Circuit, therefore, the issue in *Easterwood* "was whether the regulation was applicable by virtue of federal financial participation, not whether the regulation, if applicable, actually prescribed a particular safety device at a particular crossing." *Id.*

Despite establishing that federal funds had participated in the installation of reflectorized crossbucks at the crossing at issue in that case, the *Shots* Court found that the Secretary had not made a determination that reflectorized crossbucks were adequate for that particular crossing. Rather, the crossbucks had been installed as a result of an agreement between the State of Indiana and the Secretary of Transportation to place reflectorized crossbucks at 2,638 crossings that either lacked crossbucks altogether, or lacked the more effective, reflectorized variety. *Shots*, 38 F.3d at 306. This agreement to bring all the crossings in Indiana up to a minimum safety level was not the same as a determination by the Secretary that one particular crossing, out of the 2,638 covered, was adequately protected by nothing more than the minimum. As Judge Posner pointed out:

> Minimum is not a synonym for optimum, or even adequate. . . The task was to maximize grade-

> crossing safety in the state as a whole, subject to a budget constraint, so it was to be expected that adequate safety might be sacrificed at some crossings to enable minimum safety to be achieved at all. . . . [Thus,] the agreement was a step on the road to adequate safety rather than a determination by the State of Indiana or the federal Secretary of Transportation as to what safety devices would be adequate at each of the thousands of crossings covered by it.

Id. at 308-09.

Thus, the Seventh Circuit in *Shots* announced a two-part test for preemption in grade crossing cases: (1) establish whether subsection (b)(3) or (4) applies at all (*i.e.*, whether federal funding participated in the installation of warning devices at the crossing in question); and (2) establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.

Although alone among circuit courts, the Seventh Circuit is not the only federal court to refuse to accept the fiction of constructive approval; that is, the fiction that federal funding is the equivalent of a determination that the devices being funded are adequate protection at a particular crossing. In *Heizelman v. Southern Pacific Transportation Co.*, the District of Oregon adopted the findings and recommendation of the magistrate judge, who had explained:

> To characterize the happenstance method by which FHWA funds were approved for the [safety measures

> in question] as an act which triggered preemption is to ignore, it seems, the whole point of the *Easterwood* doctrine. . . . [I]t makes no sense to find that the railroad has been excused from its common law duty to maintain safe crossings simply because, without any analysis by anyone regarding what devices were required at [the particular crossing] under the federal regulatory scheme, FHWA signed off on a request for funds, a portion of which came to be applied to defray the cost to the county of installing these [safety measures].

Heizelman v. Southern Pac. Transp. Co., Case No. 91-6134-TC, Findings and Recommendation of the Magistrate Judge, slip op. at *8-*9 (D. Or. Dec. 9, 1993). According to the *Heizelman* Court, "[t]he key point is that there must be an evaluation of the adequacy of the warning devices in place at a crossing under both subsections (b)(3) and (b)(4) before preemption applies." *Heizelman v. Southern Pacific Transportation Co.*, Case No. 91-6134-TC, Order of the District Court, slip op. at *7 (D. Or. June 8, 1994).

The vital difference between the approach adopted by the Fifth, Eighth, and Tenth Circuits and that adopted by the Seventh Circuit is that the former accepts the doctrine of constructive approval, while the latter rejects it. The fiction of constructive approval, noted Judge Posner, is not only unrealistic, but unwise:

> Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warnings at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or

> most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal standards.

Shots, 38 F.3d at 309.

For the reasons that follow, we agree with the Seventh Circuit.

According to the Supreme Court, preemption analysis must "start with the assumption that the historic police powers of the States [were] not to be superseded by [the] Federal Act unless that [was] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The doctrines of federalism and judicial restraint both counsel courts against lightly casting aside the "basic assumption that Congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Moreover, "the regulation of health and safety matters is, primarily and historically, a matter of local concern." *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985). Thus, the presumption against federal preemption of state law is "particularly apt" in the area of railroad safety. *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991). Indeed, the *Easterwood* Court, itself, noted "the relatively stringent standard set by the language of [the FRSA's preemption clause] and the presumption against pre-emption . . . ." *Easterwood*, 507 U.S. at 668.

The presumption against preemption looms even larger in the present context, where no analogous federal remedy exists. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464

U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."). In a case such as this one, a finding of preemption relieves the railroad of any responsibility for the types of warning devices at a particular crossing (or set of crossings). Removing responsibility from the railroad is appropriate in cases where the federal government has assumed responsibility by stepping in and making its own determination, but interpreting *Easterwood* too broadly (*i.e.*, finding preemption prematurely) will remove responsibility from the railroads before the federal government has stepped in. In that case, no one is responsible for the safety of the motorists who use the crossing; we find in the FRSA no clear intent to achieve such an effect.

Of course, the Supreme Court has already determined that the FRSA can and does preempt state law, where applicable, and this Court is bound by that determination. The Supreme Court did not, however, determine the preclusive effect of the FRSA in cases, such as the present one, where the record establishes nothing more than the bare fact that federal funding participated in the installation of warning devices at a particular crossing. It is appropriate, therefore, that this Court bear in mind both the strong presumption against preemption and the mandate that, even where Congress has explicitly provided for preemption, courts should adopt "a narrow interpretation of such an express command . . . ." *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996).

The Seventh Circuit's more reasoned (and more reasonable) approach succeeds on this score, while the approach of the other circuits fails. The Seventh Circuit's narrow approach limits federal preemption in grade crossing cases to only those instances where federal regulatory authority

has been exercised. The more expansive approach of the other circuits turns any decision to spend federal money on railroad warning devices into an eradication of state sovereignty, regardless of how or why the decision was made.

In addition to being in harmony with the presumption against preemption, the narrow approach is more faithful to the Supreme Court's holding in *Easterwood*. We think it is illogical to read *Easterwood*, as the Fifth, Eighth, and Tenth Circuits have done, for the broad proposition that state law is preempted whenever and wherever federal funding has participated in the installation of railroad devices, because the holding in that case did not begin to go so far. Indeed, the Supreme Court never reached the issue because there was no evidence in that case of federal funding.

Moreover, the narrow approach is more consistent with the FRSA's goals of promoting railroad safety, reducing railroad accidents, and reducing deaths and injuries as a result of such accidents. As Judge Posner noted in *Shots*, focusing on federal funding as the only criterion for preemption would, in many cases, have the effect of removing the protections of state law from large numbers of crossings which have not yet been analyzed in accordance with subsections (b)(3) and (4). These subsections set up specific guidelines for the installation of warning devices at grade crossings—guidelines which, if followed, should lead to safer crossings and fewer accidents.

Subsections (b)(3) and (4) embody a system of incentives designed to increase safety at grade crossings. In exchange for improving warning devices at a particular crossing, the states get federal funding for the improvement and the railroad (in addition to having the improvement underwritten by a state request for federal money)

Norfolk Southern and Amicus AAR present several other arguments in favor of preemption. First, they argue that the fiction of constructive approval is statutorily mandated by 23 U.S.C. § 109 and 23 C.F.R. § 630.114(b) (1996) (amended and recodified at 23 C.F.R. § 630.106(a) (effective Feb. 14, 1997)). Section 109(e) provides that "[n]o funds shall be approved by expenditure . . . unless proper safety protective devices complying with the standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad crossing. . . ." 23

This is not to say that the expansive approach lacks any redeeming value. Brightline rules are both easier to understand and easier to administer. Moreover, the expansive approach would likely reduce the number of warning device tort claims, to the relief of overloaded state courts and the dismay of personal injury lawyers. One need look no further than the Amicus Brief of the American Association of Trial Lawyers to see how important the preemption issue is to personal injury lawyers.

prize only if they have, in fact, taken the desired action. Under the expansive approach, however, railroads get the prize whether or not they have taken the desired action. It takes nothing more than a rudimentary understanding of economics to see that an incentive-based system does not work unless the reward is somehow tied to performance of the desired action.

receives immunity from state tort actions related to that crossing. In effect, the railroads get a huge benefit if they work with the state to take the desired action. As evidenced by the Amicus Brief filed by the American Association of Railroads ("AAR"), immunity from state tort actions is no small prize. Under the narrow approach announced by the Seventh Circuit, railroads receive that

U.S.C. § 109(e). Section 630.114(b) states that "FHWA issuance of an authorization to proceed with the work on any phase of a highway project . . . can be given only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied." 23 C.F.R. § 630.114(b).

From these two sources, Norfolk Southern and AAR argue that any approval of federal funding for grade crossing improvement is tantamount to a decision that the improvement being made is adequate to protect against the risk at a particular crossing; hence, state law claims are preempted. Although the cited provisions may demonstrate that the TDOT program was not carried out in compliance with applicable law, these provisions do little more than reiterate the requirements of 23 C.F.R. §§ 646.214(b)(3) and (4). They do not require us to accept the fiction of constructive approval, and we decline to do so.

Norfolk Southern further argues that railroads will be unable to meet the burden of proof required by the narrow appoach. It is well established that the party seeking shelter under the umbrella of preemption bears the burden of showing that preemption applies. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 255 (holding that the "burden is on the party claiming preemption to demonstrate its existence"); *Easterwood*, 507 U.S. at 670 ("[P]etitioner has failed to establish that the regulations apply to these cases, and hence we find respondent's grade crossing claim is not pre-empted."). According to Norfolk Southern, the narrow approach would require a railroad to show first that the crossing without active warning devices was federally funded and then that a diagnostic team had determined that active warnings were unnecessary.

Such a showing would be impossible, argues Norfolk Southern, because 23 U.S.C. § 409 prohibits the discovery of or admission into evidence of "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds . . . ." 23 U.S.C. § 409 (footnote omitted). Apparently, this provision was designed "to foster the free flow of safety-related information between the railroad industry and its regulatory bodies by precluding the possibility that such information would be discoverable and admissible in civil suits." *Sawyer v. Illinois Cent. Gulf R. Co.*, 606 So.2d 1069, 1073 (Miss. 1992) (citation omitted). *See also Claspill v. Missouri Pac. R. Co.*, 793 S.W.2d 139, (Mo.), *cert. denied* 498 U.S. 984 (1990); *Miguez v. Southern Pac. Transp. Co.*, 645 So.2d 1184 (La. Ct. App. 1994).

The narrow approach is unworkable, the argument goes, because § 409 renders it impossible for a railroad to demonstrate that a diagnostic team determined active warnings to be unnecessary at a crossing where (b)(3) conditions exist. Yet, railroads need not depend on diagnostic team reports at all. Subsections (b)(3) and (4) unambiguously require FHWA approval for any crossing that does not have active warnings. The reason for the absence of active warnings—*i.e.*, either the dangerous (b)(3) conditions do not exist, or such dangerous conditions do exist, but a diagnostic team has determined active warnings to be unnecessary—is quite irrelevant. Either subsection (b)(3) is applicable, in which case active warnings are required, or it is not applicable, in which case FHWA approval is required.

We conclude that Norfolk Southern misreads the requirements of § 409. As we have noted above, that section, in pertinent part, prohibits discovery and admission into evidence of "reports, surveys, schedules, lists, or data compiled or collected . . . pursuant to sections 130, 144, and 152 of this title . . . ." 23 U.S.C. § 409. Section 130, dealing with payment of costs of railway-highway crossings, among other things requires the state to conduct particular surveys, *see* 23 U.S.C. § 130(d); to establish and implement particular schedules, *see id.*; and to make annual reports which include lists and compilation and analysis of data, *see* 23 U.S.C. § 130(g). Section 144, dealing with highway bridge replacement programs, among other things requires the Secretary, in conjunction with the states, to inventory and classify bridges, *see* 23 U.S.C. § 144(b), and requires the Secretary to submit to Congress biennielly his report inventorying and classifying the bridges, *see* 23 U.S.C. § 144(i). Section 152, dealing with elimination of highway hazards, among other things requires each state to conduct engineering surveys of public roads and to establish and implement schedules of projects for their improvement, *see* 23 U.S.C. § 152(a); and to submit an annual report to the Congress on the progress being made to eliminate highway hazards, *see* 23 U.S.C. § 152(g). This annual report is required to contain compilations and analysis of extensive data, and is the basis for the annual report that the Secretary of Transportation must file with the Congress. *See id.* Section 409 explicitly prohibits these "reports, surveys, schedules, lists, or data compiled or collected" from being discovered and admitted into evidence. Section 409 does not, however, mention the Secretary's approval of any project as to which these "reports, surveys, schedules, lists, or data" have been "compiled or collected," although both §§ 144 and 152 explicitly provide for the Secretary to issue

approvals for these projects, *see* 23 U.S.C. §§ 144(d) and (k) and 152(b). We are satisfied that the FWHA's approval, *i.e.*, the approval of the Secretary or his agent, of the use of passive warning devices at a particular crossing is not barred from discovery or admission into evidence by § 409.

In order for preemption to apply, Norfolk Southern was required to demonstrate that either subsection (b)(3) or (b)(4) was applied to the Oakwood Church Road Crossing. Because the crossing had passive, rather than active, warnings, Norfolk Southern was forced to demonstrate the application of (b)(4). In order to do so, however, Norfolk Southern needed to show that the FHWA approved passive warnings at the Oakwood Church Road Crossing. Norfolk Southern failed to do so, because, as we have held, federal funding alone is insufficient to make such a showing.

For these reasons, we AFFIRM the lower court's decision that federal law does not preempt Shanklin's state law negligence claim for failure to maintain adequate warning devices.

B.

In addition to arguing that Shanklin's claims are preempted by the FRSA, Norfolk Southern contends that the evidence failed, as a matter of law, to establish Shanklin's right to recover. The evidence was insufficient, argues Norfolk Southern, in that it failed to establish that Shanklin's comparative fault was less than its own. Under Tennessee law, a plaintiff may recover if his negligence is less than that of the defendant, but not if his negligence equals or exceeds that of defendant.

In a state law action in which diversity forms the basis for federal jurisdiction, this Court looks to the state law to determine the standard under which to review a motion

for a directed verdict. *See Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 56 F.3d 726, 733 (6th Cir. 1995); *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 726 (6th Cir. 1994). This case is governed by the laws of Tennessee. Under Tennessee law, a motion for judgment as a matter of law may be granted only if the court, after construing the evidence most strongly in favor of the non-movant and discarding all countervailing evidence, determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence, and those conclusions are adverse to the non-movant. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994). "If there is any doubt as to the proper conclusion to be drawn from the evidence, the motion must be denied." *Id.* In other words, Norfolk Southern will win on this issue only if the evidence is such that there is no way that a reasonable jury could have found in Shanklin's favor. This is an exceptionally heavy burden, and Norfolk Southern fails to carry it.

Norfolk Southern contends that the only conclusion reasonable minds could have reached in this case is that Shanklin was at least as negligent as Norfolk Southern, or that Norfolk Southern was not negligent at all. Specifically, Norfolk Southern claims that Shanklin (1) should have seen the train coming, (2) should have heard the whistle blowing, and, therefore, (3) should have yielded the right of way as required by Tennessee law.

Evidence was presented at trial that Shanklin could have had an unobstructed view of the train when he was 85 feet from the crossing, thus giving him a mere 2.7 seconds in which to stop the car and avoid the collision. Moreover, there was extensive expert testimony that the limited sight distance caused by vegetation, terrain, and the proximity of a house created a "trap" which made it impossible for Shanklin to see the train in time to avoid

the collision. Experts also testified that the train's headlamp was inadequate because it pointed straight down the track, rather than at an angle that would provide warning to a person approaching the crossing. There was also testimony that the headlamp could be confused with an ordinary street light if seen at night. Indeed, the engineer of the train testified that he never saw Shanklin's vehicle prior to the accident, and the other two crew members testified that they only saw Shanklin's car when it was too late to stop.

As for Shanklin's ability to hear the train, the record shows that he had his heater fan on, his car windows up, and his radio playing. Norfolk Southern chose to use at trial a taped recording of the train's whistle to demonstrate that Shanklin could have heard the train. The jury could not hear the whistle, despite the fact that the tape was made in a car without the radio or heater fan on while the car was sitting still. Norfolk Southern did not give the jury much to help it arrive at the conclusion Norfolk Southern now claims is inescapable.

Although no direct evidence was presented about the precautions taken by Shanklin as he approached the crossing, the record did establish that he was driving a mere 20 miles per hour. This, combined with the evidence about his inability to see and hear the train, makes it quite clear that reasonable minds could differ as to whether and to what extent Shanklin was negligent. So, too, reasonable minds could differ about whether and to what extent Norfolk Southern was negligent. Under these circumstances—looking at the evidence in the light most favorable to Shanklin and discarding all countervailing evidence—we cannot say that reasonable minds could not differ regarding the amount of negligence of both Shanklin and Norfolk Southern.

CONCLUSION

For the reasons stated above, the decision of the district court is **AFFIRMED** in all respects.

APPENDIX B

[Filed Apr. 17, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

No. 94-1212

DEDRA SHANKLIN, Individually and as Next Friend of JESSIE GUY SHANKLIN,
Plaintiff,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a wrongful death action filed by the Plaintiff, Dedra Shanklin, as the surviving spouse of Eddie Shanklin, deceased. The action was filed by the Plaintiff individually and as the mother of Jessie Guy Shanklin, against the Defendant, Norfolk Southern Railway Company. Jurisdiction of the court is based on diversity of citizenship. 28 U.S.C. § 1332. Before the court are motions for summary judgment on behalf of both the Plaintiff and the Defendant.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex Corp.*, 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). However, the court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. *Id.* at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

This action arises out of an accident that occurred in Gibson County, Tennessee, on October 3, 1993. While driving his vehicle east on Oakwood Road, Eddie Shanklin collided with one of the Defendant's trains at the Oakwood Road railroad crossing, resulting in his death. The Plaintiff's claims are based on both Tennessee common law and statutory law, and include allegations that the accident was the result of the Defendant's negligence in operating its train at an excesive rate of speed and failing to sound the horn or apply the brakes in a timely fashion; failing to remove vegetation from the area surrounding the crossing; failing to install a "ditch light" on the train; and failing to install adequate warning devices at the crossing. Defendant has moved for summary judgment on the grounds that Plaintiff's claims are preempted by federal railroad safety regulations. The federal regulations regarding railroad safety standards were promulgated pursuant to the authority granted by the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §§ 421-447. On July 5, 1994, this Act was repealed by Pub. L. 103-272, 108 Stat. 1379, and revised and recodified at 49 U.S.C. §§ 20101-20153. The statute governing federal pre-emption is 49 U.S.C. § 20106:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;

> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

EXCESSIVE SPEED, INADEQUATE HORN AND BRAKING

It appears to be undisputed that, at the time of the accident, the train involved was traveling at a speed of 40 miles per hour, and that the track at the Oakwood Road crossing is class IV track. Federal regulations set the speed limit for class IV track at 60 miles per hour. 49 C.F.R. § 213.9(a). Defendant contends that Plaintiff's excessive speed claim is preempted by this federal speed regulation. An examination of *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993), reveals that Plaintiff's state law excessive speed claim is indeed pre-empted. *Easterwood* held that where a train is not exceeding the federal speed limit, a state law claim which would impose a more stringent standard was pre-empted. *Id.* at 1742-43. *See also Wright ex rel. Wright v. Illinois Cent. R.R.*, 868 F. Supp. 183, 186-87 (S.D. Miss. 1994); *Stanton v. National R.R. Passenger Corp.*, 849 F. Supp. 1524, 1527-28 (M.D. Ala. 1994). Therefore, the Defendant is entitled to summary judgment on Plaintiff's excessive speed claim.

The Defendant is not, however, entitled to summary judgment on Plaintiff's claims of failure to sound the horn and apply the brakes in a timely fashion. Contrary to Defendant's assertions, an examination of the evidence reveals that there is a disputed issue of material fact regarding these claims. The court notes that, although the excessive speed claim is itself preempted, evidence of the

rate of speed may be relevant on the timeliness of the horn warning and the application of the brakes.

VEGETATION

The Defendant also contends that Plaintiff's claims that vegetation obstructed the decedent's view of the track are also preempted by federal railroad safety regulations. The court disagrees. The federal regulation regarding vegetation at railroad crossings provides, in relevant part, that "[v]egetation on railroad property which is on or immediately adjacent to roadbed must be controlled so that it does not . . . obstruct visibility of railroad signs and signals" or "prevent proper functioning of signal and communication lines." 49 C.F.R. § 213.37. Plaintiff does not allege that vegetation at the crossing obscured railroad signs or signals, or prevented the functioning of signals. Plaintiff also does not allege that the obstructing vegetation was "on or immediately adjacent to" the roadbed. Plaintiff merely alleges that the vegetation in the area obstructed the decedent's view of the track. Only claims as to vegetation *on or immediately adjacent to the roadbed* are pre-empted. States are free to regulate vegetation beyond that area. *See Bowman v. Norfolk S. Ry.*, 832 F. Supp. 1014, 1020-21 (D.S.C. 1993). Therefore, this claim is not preempted, and there is a disputed issue of fact regarding whether the vegetation was sufficient to create an obstruction, and whether the Defendant should have worked with the adjoining landowners to correct any problems. The Defendant is not entitled to summary judgment on this issue.

"DITCH LIGHT" CLAIM

It is not clear to the court that Plaintiff has actually alleged that the Defendant was negligent in failing to equip the locomotive with a "ditch light." However, to

the extent that such a claim may be intended to fall within one of the broader allegations, the court will address the issue.

In *Springston v. Consolidated Rail Corp.*, 863 F. Supp. 535, 538-42 (N.D. Ohio 1994), the court held that a claim that a locomotive should have been equipped with ditch lights was preempted by the Boiler Inspection Act ("BIA"), 45 U.S.C. § 23 (now codified at 49 U.S.C. § 20701). The *Springston* court relied on *Napier v. Atlantic C.L.R. Co.*, 272 U.S. 605 (1926), which held that Congress intended the BIA to occupy the field of locomotive equipment regulation. This court agrees with the reasoning of the court in *Springston* that the equipment required on a locomotive is preempted by federal regulation. Therefore, the Defendant is entitled to summary judgment on this issue.

INADEQUATE WARNING DEVICES

The most complex preemption issue concerns Plaintiff's claim that the Defendant was negligent under Tennessee law for failing to provide adequate warning devices at the Oakwood Road crossing. Under the Highway Safety Act of 1973 ("HSA"), federal funds are made available to the states to improve grade crossings. The states are to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d). Additional regulations were promulgated by the Secretary of Transportation through the Federal Highway Administration ("FHWA"), under the authority of HSA and FRSA. The Defendant contends that Plaintiff's inadequate warning devices claim is preempted by 23 C.F.R. § 646.214(b)(3) and (b)(4). These regulations provide:

(3)(i) *Adequate warning devices*, under § 636.214 (b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, continuing accident occurrences, or any combination of these conditions.
(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.414 (b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

In *Easterwood*, 113 S. Ct. at 1740-41, the Court held that these regulations cover the same subject matter as state law inadequate warning device claims. When the regulations are applicable, such claims are preempted. Therefore, the issue is whether the regulations are applicable in this case, so as to preempt Plaintiff's claim.

The Defendant contends that when a crossing is upgraded using federal funds, preemption is automatically triggered, without consideration of whether any of the factors set forth in subsection (b)(3) are present. In support of this position, the Defendant relies upon the following statement in *Easterwood*:

> In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which the railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

113 S. Ct. at 1741. In *Easterwood*, however, there were no federal funds expended on the crossing upgrade. Therefore, the Court did not have occasion to decide whether the expenditure of federal funds *alone* would trigger preemption, even if one of the conditions specified under section (b)(3) is present. The court notes, however, that the Supreme Court formulated the issue as whether the "*preconditions* for the application of either regulation have been met." *Id.* (emphasis added). The use of the plural suggests that the Court contemplated that federal funding was merely the first condition required to trigger preemption.

The Defendant cites two published post-*Easterwood* cases in support of its position, *Elrod v. Burlington N.R.R.*, 68 F.3d 241, 243-44 (8th Cir. 1995), and *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 384-87 (5th Cir. 1995). Also cited is an unreported district court case, *McDaniel v. Southern Pac. R.R.*, No. 3:94-CV-1917-X (N.D. Tex. Dec. 1, 1995), and an unreported state law case from an Iowa trial court, *Lubben v. Chicago Cent. & Pac. R.R.*, No. LA 25096 (Iowa D. Ct. Dec. 18, 1995). Each of these cases, however, involved grade crossings where no (b)(3) conditions were found to exist. As stated, *Easterwood* did not address preemption where such conditions exist; it found merely that no federal funding was present. 113 S. Ct. at 1741.

In *Hester*, a (b)(4) case, the court stated that federal funding of the installation of warning devices "presupposes that the Secretary approved and authorized the expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task." 61 F.3d at 387. The court finds this reasoning unpersuasive. The record in this case shows that the reflectorized crossbucks and advance warning signs at the Oakwood Road crossing, although federally funded, were only a small part of a minimum protection program designed to place such minimum protection at all Tennessee crossings. Although authorization for the expenditure was given by the FHWA, there is no evidence in the record that there were specific determinations that such passive warning devices were adequate for particular crossings. At stated in *Shots v. CSX Transp., Inc.*, 38 F.3d 304, 308 (7th Cir. 1994), authorization of such minimum protection plans does not "imply that the thousands of crossings covered by it would be adequately safe if equipped with reflectorized cross-bucks. . . . Minimum is not a synonym for optimum, or even adequate." Furthermore, although the Defendant points to evidence that the "project" was inspected, there is a factual dispute regarding whether the Oakwood Road crossing in particular was inspected. There is also a dispute regarding whether the inspection, if made, was to verify the adequacy of the warning devices, or merely to inspect the workmanship of the devices.

The record in this case shows that at least some of the (b)(3) conditions appear to exist at the Oakwood Road crossing. These conditions include high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing. § 646.214(b)(3)(i)(C)-(E). Yet, there is no evidence in the record that the Oakwood Road crossing was the subject of a study by a diagnostic team. The court agrees with the analysis in *Eldridge v. Missouri Pac. R.R.*, 832 F. Supp. 328 (E.D. Okla. 1993), in which it was stated that subsection (b)(3)(i)(F)

> mandate[s] the use of a diagnostic team before the railroad may use its own discretion, or delegate its authority, to determine the type of warning devices necessary for individual crossings under section (4). Section 3(i)(F) states that automatic gates with flashing light signals are required when a diagnostic team recommends them. *Section 3(ii) distinctly delineates the requirement that before the FHWA can find that automatic gates with flashing light signals are not required, a diagnostic team must justify that such devices are not appropriate.* Section (4) only comes into play "for crossings where the requirements of § 646.214(b)(3) are not applicable." As is apparent from a plain reading of section 3(ii), a determination under section (4) that the require-

ments of section (3)(i) are not applicable must first be made by a diagnostic team.

Id. at 333-34 (emphasis added). As no diagnostic recommendation was made, there was no basis for FHWA approval or disapproval.

Because of the presence of conditions specified in § 646.214(b)(3), and the absence of a recommendation by a diagnostic team pursuant to subsection (b)(3)(ii), the court finds that the preconditions for triggering preemption of Plaintiff's inadequate warning devices claim have not been met. Therefore, the Defendant is not entitled to summary judgment on the grounds of preemption.

Plaintiff's motion for summary judgment argues that the existence of (b)(3) conditions, and the absence of active warning devices at the Oakwood Road crossing amounts to negligence per se on the part of the Defendant. Therefore, Plaintiff argues, she is entitled to judgment as a matter of law on this claim. The federal regulation, however, is merely a standard that may be some evidence of negligence under Tennessee law. Plaintiff must still prove that any negligence on the part of the Defendant was the proximate cause of the accident. Contrary to Plaintiff's assertion, there are disputed issues of fact remaining to be resolved on this claim, and summary judgment is not appropriate.

CONCLUSION

In accordance with the foregoing discussion, Defendant Norfolk Southern Railway Company's motion for summary judgment is GRANTED as to Plaintiff's excessive speed and "ditch light" claims. Defendant's motion for summary judgment is DENIED as to Plaintiff's inadequate horn and braking, vegetation, and inadequate warning devices claims. Plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERED.

/s/ James D. Todd
JAMES D. TODD
United States District Judge
Date April 17, 1996

APPENDIX C

[Filed May 24, 1999]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-6371

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Plaintiff-Appellee,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant,

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *et al.*,
Defendants.

BEFORE: BATCHELDER, MOORE, and CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX D

FEDERAL STATUTES

23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-

highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States

under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least ½ of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade rail-

way-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159.)

(As amended Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980; Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

49 U.S.C. § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 866.)

APPENDIX E

FEDERAL REGULATIONS

23 CFR § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices,* under § 646.214 (b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214 (b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

No. 99-312

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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13??

QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), when it held that claims of negligence based on inadequate warning devices installed at a rail-highway grade crossing are not preempted solely because the warning devices at the crossing were paid for with federal funds.

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BRIEF IN OPPOSITION

Respondent Dedra Shanklin, the widow of Eddie Shanklin who was killed at the unprotected rail grade highway crossing in Tennessee asks this Court to deny the Petition. Under the specific facts of this case, the decision by the Sixth Circuit does not conflict with *Easterwood* or the decisions in other courts and because the petitioner's liability hinges only in small part on the matters claimed to be preempted this case is a poor vehicle for deciding any unresolved post-*Easterwood* preemption questions.

STATEMENT OF THE CASE

Petitioner Norfolk Southern Railway Company ("Norfolk Southern") maintains that this Court held in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), that mere federal spending for the installation of warning devices at rail-highway grade crossings preempts all state tort claims that the devices installed are inadequate. Pet. at 2. Respondent Dedra Shanklin, the widow of Eddie Shanklin who was killed by a Norfolk Southern train at a crossing in Tennessee, disagrees with the petitioner's description of the *Easterwood* holding.

The appellate court here, relying on Judge Posner's opinion in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994), ruled that *Easterwood* should not be interpreted as Norfolk Southern suggests. According to the court,

> the preemption analysis begins, but does not end, with the federal funding issue . . . [T]he

> *Easterwood* Court never got around to enumerating additional requirements for preemption, because the threshold requirement, federal funding, was absent in that case. Judge Posner correctly noted in the *Shots* opinion there is a difference in holding that federal funding is a necessary condition to preemption and holding that federal funding is a sufficient condition.

Pet. App. 10a.

The Seventh Circuit in *Shots* and the Sixth Circuit here refused to accept the legal fiction that federal funding is equivalent to a federal determination that the devices being funded provide adequate protection for motorists at a particular crossing. Both circuits concluded that federal preemption of state law should be limited to only those instances where federal regulatory authority has actually been exercised. *See Shots*, 38 F.3d at 309 and *Shanklin* at Pet. App. 13a. This approach advances the goals in the Federal Railroad Safety Act of 1970 ("AFRSA"), Pub. L. No. 91-458, 84 Stat. 971, of promoting railroad safety by requiring that the warning devices paid for with federal funds be installed in compliance with the federal regulatory scheme without interfering with the states' historic powers to regulate matters of health and safety.

1. Statutory and Regulatory Background.

The relationship between 23 C.F.R. § 646.214(b)(3) and (b)(4), the federal regulations that govern the process for selecting the devices that the Secretary of Transportation ("Secretary") has determined are necessary to provide an adequate warning to motorists at a particular

crossing, is at the heart of this case. Section 646.214(b) provides, in pertinent part,

> (3)(i) *Adequate warning devices* . . . on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
>
> (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
>
> (F) A diagnostic team recommends them.[1]
>
> (ii) In individual cases where a diagnostic team justifies that gates are not appropriate,

[1] For definition of "diagnostic team," see 23 C.F.R. § 646.204(g) (1992).

> FHWA may find that the above requirements are not applicable.
>
> (4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

In general, the flashing lights and gates required under (b)(3) are called active devices and the crossbucks allowed by (b)(4) are called passive devices.

2. Statement of Facts.

Shanklin relies on the statement of facts in the decision of the Sixth Circuit, Pet. App. 2a-5a, and in particular notes the following. In 1987, the Tennessee Department of Transportation ("TDOT") installed reflectorized crossbucks at the Oakwood Church Road Crossing, where the accident occurred, as part of a "mop-up" detail under the "minimum protection" program that included the installation of passive warning devices at 196 crossings in 11 West Tennessee counties. The improvements were undertaken to bring the crossing into compliance with 23 C.F.R. § 130(d), which mandates that a state establish a schedule of crossing safety projects and that "[a]t a minimum such schedule shall provide signs for all railway-highway crossings." Pet. App. at 3a.

Because the upgrade was not done under the state's "priority program," no diagnostic team examined the Oakwood Church Road Crossing to determine what warning devices were necessary to provide an adequate

warning to motorists. Pet. App. 35a-36a. There was no oversight by the federal government which "merely funded, funneled and signed off on this project." C.A. App. 322-23. As Petitioner admits, the Oakwood Church Road Crossing was not even one of the few crossings of the 196 crossings under this contract viewed in the random drive-by conducted by an FHWA employee. Pet. at 9-10.

Contrary to the Petitioner's assertion that the Oakwood Church Road Crossing is governed by section (b)(4), the District Court noted,

> [T]he record in this case shows that at least some of the (b)(3) conditions appear to exist at the Oakwood Church Road Crossing. These conditions include high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing.

Pet. at 14; Pet. App. 3a, 35a-36a.

The Sixth Circuit was also mindful that a diagnostic team did not evaluate whether active warning devices should have been installed at the Oakwood Church Road Crossing. Pet. App. 13a, 19a. According to the court, "[I]t makes no sense to find that the railroad has been excused from its common law duty to maintain safe crossings simply because without any analysis by anyone regarding what devices are required at [the particular crossing] under the federal regulatory scheme, FHWA signed off on a request for funds." Pet. App. 13a-14a. The appellate court concluded that either subsection (b)(3) was applicable, in which case active warnings are required, or it was

not applicable, in which case FHWA approval of the type of devices to be installed was required under (b)(4).

In addition to her inadequate warning device claim, Shanklin also alleged that Norfolk Southern was negligent under Tennessee law for failing to give adequate sound warning by the locomotive horn, to apply the brakes, and to remove vegetation from the area surrounding the crossing. The Sixth Circuit noted that "there was extensive expert testimony that the limited sight distance caused by vegetation, terrain, and the proximity of a house created a "trap" which made it impossible for Shanklin to see the train in time to avoid the collision." Pet. App 23a. Moreover, experts also testified that the train's headlamp was inadequate because it pointed straight down the track, rather than at an angle, and that Eddie Shanklin could not have heard the train's horn. Pet. App. 23a-24a. The jury returned a general verdict; Norfolk Southern did not ask for any special verdict form or interrogatory that would have reflected which of Shanklin's claims provided the basis for its decision.

REASONS FOR DENYING THE WRIT

A. UNDER THE SPECIFIC FACTS OF THIS CASE, THE DECISION BY THE SIXTH CIRCUIT DOES NOT CONFLICT WITH *EASTERWOOD* OR THE DECISIONS IN OTHER COURTS.

The Sixth Circuit decision is consistent, not only with federal regulations and *Easterwood*, but also with the decisions of the other circuits and the state supreme courts. In that regard, in *Easterwood*, this Court stated, "States **must**

employ automatic gates with flashing light signals as part of any improvement project that concerns a crossing that features, *inter alia*, multiple tracks, high speed trains operating in areas of limited visibility, heavy vehicle or train traffic, or if a diagnostic team made up of 'representatives of the parties of interest in [the crossing], § 646.204(g), recommends them." *Easterwood*, 507 U.S. at 666 (emphasis added). Not a single court – with the exception of the Eighth Circuit in *Bock v. St. Louis Southwestern Ry. Co.*, 181 F.3d 920 (8th Cir. 1999) (cert. petition is expected to be filed within the month) – has held that the installation of passive warning devices (i.e. crossbucks), paid for with federal funds at a crossing that has the conditions described in section (b)(3) where no diagnostic team has justified the absence of automatic gates, preempts state inadequate warning device claims. Instead, the rulings of courts of appeal and state supreme courts relied upon by the petitioner noted that no (b)(3) conditions existed at the crossing at issue or refused to consider the presence of (b)(3) conditions.[2]

[2] See, e.g., *Hester v. CSX Transportation, Inc.*, 61 F.3d 382, 386 FN 6 (5th Cir. 1995), where the Fifth Circuit stated, "Of course passive warning devices are not adequate where section 646.214 (b)(3) applies, but it seems clear on the facts before us that the applicable provision is section 646.214 (b)(4)." *Bryan v. Norfolk and Western Ry. Co.*, 154 F.3d 899, 903-04 (8th Cir. 1998); *Elrod v. Burlington N. RR. Co.*, 68 F.3d 241, 243 FN 5 (8th Cir. 1995); *Armijo v. Atchison, Topeka and Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Ingram v. CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998); *Union Pacific v. Sharp*, 952 S.W.2d 658, 665 (Ark. 1997); and *Lubben v. Chicago Central & Pac. R.R. Co.*, 563 N.W.2d 596, 598 (Iowa 1997), there was no question but that (b)(4) crossing devices were appropriate.

In *Bock*, the Eighth Circuit referred to *Elrod* in holding that "once a federally funded warning device is installed and operational – the crossbucks in this case – preemption occurs," 181 F.3d at 923, but the facts in *Bock* are quite different from those in *Elrod*. In *Elrod* there was no question but that the crossing was a (b)(4) crossing requiring a passive sign only, and therefore, *Elrod* concerned an issue *not* presently before this Court. Moreover, *Bock* involved a crossing that had been designated a (b)(3) crossing, but the accident in that case occurred before a gate with flashing lights was installed. The court in *Bock*, held that the earlier installation of crossbucks with federal funds barred the plaintiff's claim despite the fact that a diagnostic team had, at a later time, diagnosed the crossing as a (b)(3) crossing requiring active warning devices and ordered them to be installed. At the time of Elmer Bock's death the warning devices had not yet been installed.

As we explain below, if this Court is to grant certiorari on the (b)(3) issue, *Bock* is the appropriate case for review.

B. THIS CASE IS A POOR VEHICLE FOR DECIDING ANY UNRESOLVED POST-*EASTERWOOD* PREEMPTION QUESTIONS BECAUSE THE PETITIONER'S LIABILITY HINGES ONLY IN SMALL PART ON THE MATTERS CLAIMED TO BE PREEMPTED.

Petitioner's characterization of the preemption issue as a "principal issue" at trial and on appeal is inaccurate. Although the issue was argued in pre-trial motions, bench conferences and the appellate briefs, the jury heard

little beyond Norfolk Southern's assertion that the responsibility for signalization rested with the government. Norfolk Southern did not request a special verdict form to allow the jury to explain the basis for the decision. The Sixth Circuit rejected Norfolk Southern's claim that there was no other evidence on which a reasonable jury could base its verdict. Pet. App. 24a. For the above reasons, the result in this case cannot be changed by this Court's grant of further review.

Moreover, a petition for certiorari review is expected to be filed in *Bock*, and the Eighth Circuit's decision in that case would provide a better vehicle to address the question of whether claims of negligence based on inadequate warning devices at a railway grade crossing are preempted because the devices were paid for with federal funds. *Bock* was decided on a motion for summary judgment that addressed the preemption issue only; whereas here, the jury may have based its decision on any one of several negligence claims unrelated to the inadequate warning devices claim.

CONCLUSION

Norfolk Southern's petition for certiorari should be denied.

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September 17, 1999

Supreme Court, U.S.
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No. 99-312

In The Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

In her brief in opposition, respondent does not dispute that there is a deep and mature 6-2 split among the courts of appeals and state supreme courts on the question whether claims of negligence based on inadequate warning devices at a railway grade crossing are pre-empted when the devices were installed with federal funds under a project approved by the federal government. See Pet. 13-16. Respondent also does not question the surpassing importance of this issue for railroads and plaintiffs alike, which the Sixth Circuit recognized. Pet. App. 17a-18a. Nor does respondent question the irrationality of litigating negligence when the critical evidence "compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railway-highway crossings" is barred from discovery or admission in a court proceeding by operation of law. 23 U.S.C. § 409 (footnote omitted); Pet. 16-19. Instead, respondent merely asserts in conclusory terms that this case does not present a perfect opportunity for this Court to resolve that conflict. Her arguments are flawed.

I. AS THE SIXTH CIRCUIT ACKNOWLEDGED, ITS HOLDING IS IN SQUARE CONFLICT WITH THE MAJORITY OF OTHER COURTS OF APPEALS.

Respondent argues that, on the facts of this case, the Sixth Circuit decision does not conflict with those of other circuits. Resp. Br. 6-7. The Sixth Circuit plainly believed otherwise, for it declared that its decision was in square conflict with the majority-rule courts that have held that inadequate-device tort claims are pre-empted whenever federal funds participate in the installation of warning devices under a project approved by the Federal Highway Administration ("FHWA"). Pet. App. 16a-17a.

Respondent's argument to the contrary is predicated on a basic misunderstanding of the FHWA regulation at

issue, 23 C.F.R. § 646.214. That regulation prescribes what will constitute "[a]dequate warning devices" where "Federal-aid funds participate in the installation of the devices." *Id.* § 646.214(b)(3)(i) (emphasis omitted). Subsection (b)(3) of the regulation provides that for enumerated high-risk crossings, only devices that include "automatic gates with flashing light signals" are adequate, unless the FHWA finds to the contrary based on diagnostic-team recommendations. *Id.* § 646.214(b)(3)(i), (ii). Subsection (b)(4) provides that, for all other crossings, the "type of warning device to be installed . . . is subject to the approval of FHWA." *Id.* § 646.214(b)(4). See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 666-67 (1993).

Respondent misconceives this regulation to set forth elements of an affirmative pre-emption defense that must be proven at trial. According to respondent, Norfolk Southern cannot claim pre-emption under subsection (b)(4), because she purports to have submitted proof at trial that, at the time of the accident at issue in this case, Oakwood Church Road was a high-risk crossing governed by (b)(3). See Resp. Br. 5. Respondent asserts that this distinguishes the majority-rule decisions because those courts either "noted that no (b)(3) conditions existed at the crossing at issue or refused to consider the presence of (b)(3) conditions." *Id.* at 7.

This argument is a red herring; 23 C.F.R. § 646.214 has nothing to do with trial proof of crossing conditions. The regulation instead sets forth the standards that the *FHWA*, pursuant to its statutory and regulatory obligation to assure the adequacy of warning devices, see 23 U.S.C. § 109(e); 23 C.F.R. § 630.106(a), applies in determining whether to approve federal funds for a project in the first instance. As the Supreme Court of Arkansas held in rejecting a similar argument:

> We find that such an analysis begs the question presented by this case. . . . [W]hether the conditions listed in (b)(3) exist at a particular crossing is for the FHWA, not a jury, to decide. Once the FHWA has spoken on the issue by providing federal funds for a state improvement project, the determination of whether (b)(3) conditions exist has already been made, and it may not be revisited by the state courts.

Union Pac. R.R. Co. v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

In *Easterwood*, this Court was explicit that pre-emption occurs because the FHWA regulation displaces state and railroad decisionmaking. 507 U.S. at 670.

> [F]or projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. at 671. Pre-emption is a function of the regulatory scheme, not of trial proof. Even the Sixth Circuit, despite its errors, had no illusions as to the relevance of trial proof, and it ignored these very same arguments advanced by respondent.[1] Rather, the court of appeals adopted the

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[1] The district court did lapse into the same error as respondent, *see* Resp. Br. 5, but its analysis was discarded by the Sixth Circuit.

Although irrelevant to the issue at hand, petitioner disputes respondent's contention that Oakwood Church Road was in fact a high-risk crossing. Nothing in the passages from the opinions of the courts below cited by respondent suggests otherwise. *Cf. id.* at 5-6. Both the district court on summary judgment and the court of appeals in reviewing the verdict were "construing the evidence most strongly in favor of the [respondent] and discarding all counter-

Seventh Circuit's legal rule as to what FHWA conduct would trigger pre-emption, and acknowledged that the dispositive rule it announced conflicted with the majority rule. Pet. App. 16a-17a. The question on which the courts are divided is thus cleanly presented by this case.

II. THIS CASE IS THE RIGHT VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT.

Respondent also claims that this case is a poor vehicle for resolving the split among the circuits because the jury rendered a general verdict, and she had alleged multiple claims of negligent conduct. Resp. Br. 8-9. By this logic, no railroad would ever be entitled to seek certiorari on the question presented if a general verdict is rendered against it, because plaintiffs invariably allege as many possible bases of tort liability as they can.

General verdicts are the norm in our jury system, 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2501, at 151 (2d ed. 1995), and defendants have no duty to request special verdicts.[2] Moreover, it has always been the rule that "in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless." *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919) (reversing for instructional error in negligence case); *Yazoo & Miss. Valley R.R. Co.* v. *Mullins*, 249 U.S. 531, 533 (1919) (same); *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926) (same in condemnation case). Here, contrary to *Easterwood*, the district court instructed the jury that petitioner's duty to exercise reasonable care in warning motorists of an oncoming train "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous," C.A. App. 412, and in summation respondent's counsel emphasized the theory that petitioner was negligent in not installing active warning signals at the Oakwood Church Road crossing. If this Court were to grant certiorari and adhere to *Easterwood*, there is no doubt that a retrial would be required. Thus, respondent's assertion that "the result in this case cannot be changed by this Court's grant of further review," Resp. Br. 9, is wrong. Moreover, respondent would not be prejudiced; she would be entitled to try any remaining

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vailing evidence." Pet. App. 23a, 27a. Furthermore, the notion that plaintiff's putative experts can accurately determine the need for active warning signals is fanciful; these determinations are properly made by state highway agencies through sophisticated computer modeling of a multitude of highly interdependent risk factors, conducted annually to account for changes in crossing conditions, and using data compiled only by the State and unavailable to either side in this trial. *See* Pet. 8-10.

Finally, respondent misstates the record. She twice claims that "no diagnostic team examined the Oakwood Church Road Crossing to determine what warning devices were necessary." Resp. Br. 4, 5. There is no such evidence; pursuant to 23 U.S.C. § 409, the Tennessee Department of Transportation refused to disclose whether any diagnostic team evaluated that crossing. C.A. App. 314-15; Pet. 9 n.11. Respondent also avers that the railroad crossing was "unprotected," Resp. Br. 1, despite the fact that the crossing had the full array of passive warning devices. Pet. 8 & n.9. Nearly two-thirds of the nation's public grade crossings have only passive devices, Federal Railroad Administration, U.S. Dep't of Transportation, *Rail-Highway Crossing Safety Action Plan Support Proposals* 1 (June 13, 1994) <http://www.bts.gov./smart/cat/APSP.html>, and it can hardly be said that the federal and state governments regard those crossings as "unprotected."

[2] Indeed, respondent was free to request a special verdict or interrogatories on this issue if she had been confident in the strength of her other tort or statutory claims and wished to protect the judgment from appeal on the *Easterwood* issue. *See* Fed. R. Civ. P. 49. The decision whether to grant such a request would have been within the sound discretion of the district court. 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2505, at 161 (2d ed. 1995).

legally valid claims against petitioner before a properly instructed jury. This case thus presents an unblemished vehicle for resolving the conflict among the lower courts over the proper interpretation of *Easterwood*.

Finally, respondent suggests that this Court should deny certiorari here simply because a petition for certiorari might be filed in *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920 (8th Cir. 1999), which might raise the *Easterwood* pre-emption issue. In fact, this case is far superior to *Bock* as a vehicle for determining the primary issue under *Easterwood*: namely, whether FHWA approval of federal funds for a project to install warning devices at a grade crossing is the touchstone for pre-emption of inadequate-device tort claims under state law.[3]

Bock, however, turns not only on that basic issue but also on secondary, more complicated, and less developed questions: namely, whether pre-emption is affected by a State's decision to replace devices that had been installed with federal funds, 181 F.3d at 922-23, or by delay in installing devices after federal approval, *id.* at 923. There is no clean split in the circuit courts on these subsidiary issues,[4] both of which are necessary to full resolution of

[3] Like the Sixth Circuit, Pet. App. 14a-17a, respondent consistently derides the majority rule as resting upon "the legal fiction that federal funding is equivalent to a federal determination that the devices being funded provide adequate protection for motorists at a particular crossing." Resp. Br. 2. There is no fiction. Respondent and the court of appeals simply ignore the fact that approval of the adequacy of devices is a legal condition precedent to FHWA authorization of federal funds for a project, *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996), and that FHWA regulations provide a specific procedure for evaluating the devices in question in order to approve federal funding. *See* Pet. 7-8.

[4] There is some divergence in opinion in the circuits on the timing of pre-emption (*i.e.*, when federal funds may be said to "participate" in the project). *Compare St. Louis Southwestern Ry. Co.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994) *and Thiele* v. *Norfolk & W. Ry. Co.*, 68 F.3d 179, 181-82 (7th Cir. 1995) *with Hatfield* v. *Burlington N. R.R. Co.*, 64 F.3d 559, 560-61 (10th Cir. 1995) (disagreeing as to whether federal participation short of installation was sufficient to trigger preemption). However, those cases rest on "markedly different" facts from *Bock*, as the Eighth Circuit pointed out. *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999). *Bock* thus does not present an opportunity to resolve that issue; indeed, despite its disagreement with the Eighth Circuit on the timing point, the Tenth Circuit agrees with the ruling in *Bock* that pre-emption is not affected by a decision to replace federally funded devices. *Armijo*, 87 F.3d at 1192.

Bock, and they are not yet ripe for this Court's review. The prudent and usual course would be for this Court to grant this petition and either hold the petition in *Bock* or otherwise deny it.

As respondent tacitly concedes by promoting review of *Bock*, the question presented by this petition is manifestly worthy of, and ripe for, this Court's review. The conflict among the circuits is deep and mature. Moreover, it is simply untenable and arbitrary for state tort law to be pre-empted in the 19 States of the majority-rule circuits, but not in the 7 States covered by the Sixth and Seventh Circuits. Besides affronting the equal dignity of the States, this disparity frustrates Congress's stated goal that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable," 49 U.S.C. § 20106. The question presented merits immediate resolution by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted.

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No. 99-312

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
(JACKSON)

Civil Case No. 94-CV-1212

DEDRA SHANKLIN,
Plaintiff,

v.

NORFORK SOUTHERN RAILWAY COMPANY, *et al.*,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
9/26/94	1	COMPLAINT (waiver of service of summons) Receipt #: 157445; Filing fee $120.00 - CJT (bph) [Entry date 09/26/94]
9/26/94	2	MOTION for attorney Pamela R. O'Dwyer to appear pro hac vice CJT w/p/o (bph) [Entry date 09/26/94]
10/3/94	3	ORDER by Judge James D. Todd granting motion for attorney Pamela R. O'Dwyer to appear pro hac vice [2-1] - CJT (cc: all counsel) (pb) [Entry date 10/03/94]
10/17/94	4	ANSWER by defendant Norfolk So. Railway to [1-1] (filed Mphs; recd Jackson 10/19/94) - CJT (pb) [Entry date 10/19/94]
10/27/94	5	MOTION by dfts Cincinnati, New Orleans & Texas Pacific Ry. Co. & Norfolk So. Corp. for summary judgment - CJT (pb) [Entry date 10/27/94]

DATE	NO.	PROCEEDINGS
10/27/94	6	NOTICE by Cincinnati, New Orleans & Texas Pacific Ry. Co. & Norfolk So. Corp. of intent to file affidavit w/attmt - CJT (pb) [Entry date 10/27/94]
12/21/94	7	OBJECTIONS by defendant Norfolk So. Railway to plt's first request for production of docmts - CJT (pb) [Entry date 12/21/94]
1/12/95	8	MOTION by dfts Norfolk So. Railway, Ry. Co. & Norfolk So. Corp. to extend time to respond to disc - CJT (pb) [Entry date 01/12/95]
1/18/95	9	ORDER by Judge James D. Todd granting motion to extend time to respond to disc [8-1]. Dfts allowed until 2/28/95 to respond - CJT (cc: all counsel) (pb) [Entry date 01/18/95]
2/2/95	10	SETTING LETTER - Scheduling Conference set for Thursday, 03/23/95 at 3:30 p.m. before MagJBreen (bph) [Entry date 02/02/95]
3/21/95	11	NOTICE (Disclosure statement) by Defendant Norfolk So. Railway - CJT (pb) [Entry date 03/21/95]
3/22/95	12	NOTICE (initial disclosures) by plaintiff - CJT w/attmts (pb) [Entry date 03/22/95]
3/24/95	13	SCHEDULING ORDER 16(b) Mag Judge J. D. Breen; motion filing deadline set for 1/16/96.; discovery deadline set for 12/15/95.; proposed pretrial order to be entered on 4/8/96.; pretrial conference set for 4/18/96.; jury trial set for 4/29/96.; deadline for joining parties set for 10/2/95.; deadline for amending pleadings set for 10/2/95. (cc: all counsel) (gn) [Entry date 03/27/95]

DATE	NO.	PROCEEDINGS
3/28/95	14	ORDER SETTING CASE FOR TRIAL by Judge James D. Todd jury trial 9:30, 04/29/96, pretrial conference 9:00, 04/18/96, pretrial order due by 04/08/96 (cc: all counsel) CJT, Ct Rm Deputy, Ct Reporter, Jury Deputy (bph) [Entry date 03/28/95]
3/28/95	16	CONSENT PROTECTIVE ORDER approved by Judge D. Todd - all personnel and medical records of dfts to be produced for use at trial under special confidentiality agreement - CJT, counsel of record all counsel) (mvv) [Entry date 03/29/95]
3/29/95	15	CONSENT ORDER by Judge James D. Todd: dismissing party Norfolk So. Corp., party Ry. Co. - CJT (cc: all counsel) (mvv) [Entry date 03/29/95]
6/23/95	17	SUPPLEMENT by plaintiff re notice (initial disclosures) [12-1] - CJT (pb) [Entry date 06/25/95]
9/13/95	18	SECOND SUPPLEMENT to initial disclosures by plaintiff - CJT (pb) [Entry date 09/13/95]
9/28/95	19	THIRD SUPPLEMENT to initial disclosures by plaintiff - CJT (pb) [Entry date 09/29/95]
10/2/95	20	SUPPLEMENT to designation of expert witnesses by defendant Norfolk So. Railway (filed Mphs; recd Jksn 10/5/95) - CJT (pb) [Entry date 10/05/95] [Edit date 10/05/95]
10/2/95	21	NOTICE (Designation of expert witnesses) by defendant Norfolk So. Railway/filed Mphs; recd Jksn 10/5/95/ - CJT (pb) [Entry date 10/05/95]

DATE	NO.	PROCEEDINGS
10/23/95	22	NOTICE (Disclosure of rebuttal expert witness) by plaintiff - CJT (pb) [Entry date 10/23/95]
10/27/95	23	MOTION by defendant Norfolk So. Railway for leave to designate a rebuttal expert witness - CJT wpo (pb) [Entry date 10/30/95]
10/27/95	24	MEMORANDUM by defendant Norfolk So. Railway in support of motion for leave to designate a rebuttal expert witness [23-1] - CJT (pb) [Entry date 10/30/95]
10/27/95	25	ATTORNEY'S CERTIFICATE by counsel for defendant Norfolk So. Railway - CJT (pb) [Entry date 10/30/95]
10/30/95	26	SECOND SUPPLEMENT to designation of expert witnesses by defendant Norfolk So. Railway (pb) [Entry date 10/30/95]
11/6/95	27	FOURTH SUPPLEMENT by plaintiff to initial disclosures - CJT (pb) [Entry date 11/06/95]
11/8/95	28	NOTICE (third supplement to designation of expert witnesses) by defendant Norfolk So. Railway w/attd Exh. A: vitae of Joseph Sobel and Edward Adams - CJT (pb) [Entry date 11/08/95]
11/17/95	29	ORDER by Judge James D. Todd granting motion for leave to designate a rebuttal expert witness [23-1] - CJT (cc: all counsel) (pb) [Entry date 11/20/95]
11/20/95	30	SUPPLEMENTAL Disclosure statement by defendant Norfolk So. Railway - CJT (pb) [Entry date 11/20/95]
12/1/95	31	SUPPLEMENT by plaintiff to disclosure of rebuttal expert witness - CJT (pb) [Entry date 12/04/95]

DATE	NO.	PROCEEDINGS
12/11/95	32	FIFTH SUPPLEMENT to initial disclosures by plaintiff - CJT, CJBre (pb) [Entry date 12/12/95]
12/14/95	33	MOTION by defendant Norfolk So. Railway to modify sched order - CJT wpo (pb) [Entry date 12/15/95]
12/14/95	34	MEMORANDUM by defendant Norfolk So. Railway in support of motion to modify sched order [33-1] - CJT (pb) [Entry date 12/15/95]
12/14/95	35	CERTIFICATE OF COUNSEL by defendant Norfolk So. Railway - CJT (pb) [Entry date 12/15/95]
12/15/95	36	ORDER by Judge James D. Todd granting motion to modify sched order [33-1] motion filing ddl reset for 2/16/96; depositions ddl reset for 2/9/96 - CJT (cc: all counsel) (pb) [Entry date 12/18/95]
2/13/96	37	MOTION by defendant Norfolk So. Railway for order extending the time to concluded depo of Gary P. Wolf - CJT (pb) [Entry date 02/15/96] [Edit date 02/15/96]
2/14/96	38	CONSENT ORDER EXPENDING TIME TO CONCLUDE DEPOSITION OF GARY P. WOLF by Judge James D. Todd: Plt may take the disc depo of dft's expert, Gary P. Wolf, after 2/16/96, at a time to be agreed to between the parties - CJT (cc: all counsel) (pb) [Entry date 02/14/96] [Edit date 02/15/96]
2/16/96	39	MOTION by plaintiff for summary judgment - CJT (pb) [Entry date 02/20/96]

DATE	NO.	PROCEEDINGS
2/16/96	40	MEMORANDUM by plaintiff in support of motion for summary judgment [39-1] w/ attd Exhs: 1. excerpt fr depo of Nelson E. Christianson; 2. afdt of T.H. Sellers; 3. afdt of Archie Burnham; 4. excerpt fr depo of William Cantrell - CJT (pb) [Entry date 02/20/96]
2/16/96	41	MOTION by defendant Norfolk So. Railway for summary judgment (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	42	MEMORANDUM by defendant Norfolk So. Railway in support of motion for summary judgment [41-1] (filed Mphs; recd Jksn 2/21/96)- CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	43	APPENDIX filed by defendant Norfolk So. Railway re motion for sum jgm [41-1] incl copies from legal publications and opinions fr Iowa and Texas courts (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	44	AFFIDAVIT of Edmund B. Edwards (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	45	NOTICE OF INTENT TO FILE AFFIDAVITS OF GARY P. WOLF AND CHARLES D. WICKWIRE by defendant Norfolk So. Railway w/attd Exhs: A-B. proposed docmts (filed Mphs; recd Jksn. 2/21/96) - CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	46	MOTION by defendant Norfolk So. Railway to limit venire w/attd Exhs: A-C. newspaper articles (filed Mphs; recd Jkson 2/21/96) - CJT (pb) [Entry date 02/21/96] [Edit date 02/21/96]

DATE	NO.	PROCEEDINGS
2/16/96	47	MEMORANDUM by defendant Norfolk So. Railway in support of motion to limit venire [46-1] (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/95] [Edit date 02/21/96]
2/16/96	48	MOTION by defendant Norfolk So. Railway in limine re photographs, cmplts about crossing, etc. (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	49	MEMORANDUM by defendant Norfolk So. Railway in support of motion in limine re photographs, cmplts about crossing, etc. [48-1] w/attd Exhs: 1-2. photographs (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	50	NOTICE OF FILING OF DEPOSITIONS by defendant Norfolk So. Railway (filed Mphs; recd Jksn 2/21/96) - CJT (pb) [Entry date 02/21/96]
2/16/96	51	DEPOSITION (1 cpy) of Nelson E. Christianson, III taken on the following date(s): October 12, 1995 (filed Mphs; recd Jksn 2/21/96) (pb) [Entry date 02/21/96] [Edit date 02/21/96]
2/16/96	52	DEPOSITION (1 cpy) of William Terry Cantrell taken on the following date(s): May 3, 1995 (filed Mphs; recd Jksn 2/21/96) (pb) [Entry date 02/21/96]
2/16/96	53	DEPOSITION (1 cpy) of Christopher McAnally taken on the following date(s) May 1, 1995 (filed Mphs; recd Jksn 2/21/96) (pb) [Entry date 02/21/96]
2/23/96	54	ORDER EXTENDING TIME TO CONCLUDE DEPOSITION OF GARY P. WOLF by Judge James D. Todd. Dft allowed to 2/29/96 to conclude deposition - CJT (cc: all counsel) (pb) [Entry date 02/25/96]

DATE	NO.	PROCEEDINGS
2/29/96	55	AFFIDAVIT of Charles D. Wickwire re motion for sum jgm [41-1] w/attmts: photographs - CJT (pb) [Entry date 03/02/96]
2/29/96	56	AFFIDAVIT of Gary P. Wolf re motion for sum jgm [41-1] w/attd accident report - CJT (pb) [Entry date 03/02/96]
3/7/96	57	RESPONSE by plaintiff to motion to limit venire [46-1] - CJT (pb) [Entry date 03/07/96]
3/7/96	58	RESPONSE by plaintiff to motion in limine re photographs, cmplts about crossing, etc. [48-1] w/attd Exh: 1. opinion from COA Sixth Circuit (Bryan -v- Emerson Elec) - CJT (pb) [Entry date 03/07/96]
3/7/96	59	RESPONSE (MEMORANDUM IN OPPOSITION) by plaintiff Dedra Shanklin to motion for summary judgment [41-1] w/attd Exhs: A. COA writs of certiorari; B. MS State COA brief; C. afdt of Archie Burnham; D. excerpt fr depo of A. Burnham; E. excerpt fr depo of Wm. Cantrell; F. afdt of T.H. Sellers; G. excerpt fr depo of Nelson Christianson; H. order USDC WD/TN (Mphs); I. minutes of Grade Crossing Safety Steering Committee mtg; J. excerpt fr depo of Steven Driskell - CJT (pb) [Entry date 03/07/96]
3/7/96	60	MOTION by plaintiff to exceed page limitation - CJT wpo (pb) [Entry date 03/08/96]
3/7/96	61	NOTICE OF ATTORNEY'S LIEN by Bill R. Barron - CJT (pb) [Entry date 03/08/96]
3/12/96	62	ORDER by Judge James D. Todd granting motion to exceed page limitation [60-1] - CJT (cc: all counsel) (pb) [Entry date 03/13/96]

DATE	NO.	PROCEEDINGS
3/18/96	63	REPLY (MEMORANDUM) by defendant Norfolk So. Railway to response to motion in limine re photographs, cmplts about crossing, etc. [48-1] [filed Mphs) - CJT (pb) [Entry date 03/21/96] [Edit date 03/21/96]
3/18/96	64	(MEMORANDUM IN) RESPONSE by defendant Norfolk So. Railway to motion for summary judgment [39-1] (filed Mphs) w/attmt: excerpt from videotape depo of Tom Rose - CJT (pb) [Entry date 03/21/96]
3/18/96	65	REPLY (MEMORANDUM) by defendant Norfolk So. Railway to response to motion to limit venire [46-1] (filed Mphs) - CJT (pb) [Entry date 03/21/96]
3/18/96	66	REPLY by defendant Norfolk So. Railway to plt's memorandum in opposition to dft's motion for sum jgm (filed Mphs) - CJT (pb) [Entry date 03/21/96]
3/18/96	67	NOTICE OF FILING OF DEPOSITION by defendant Norfolk So. Railway - CJT (pb) [Entry date 03/21/96]
3/18/96	68	DEPOSITION (copy only) of Archie C. Burnham taken on the following date(s): August 30, 1995 at 9:00am (pb) [Entry date 03/21/96]
3/20/96	69	ORDER OF REFERENCE by Judge James D. Todd that this action be referred to Mag J. Daniel Breen for conducting a stlmt conf - CJBre (cc: all counsel) (pb) [Entry date 03/21/96]
3/21/96	70	SUPPLEMENT by plaintiff re motion response [58-1] to dft's motion in limine w/attd Exh: A. excerpt fr depo of Archie C. Burnham - CJT (pb) [Entry date 03/21/96]
3/21/96	71	MOTION by plaintiff for pretrial conference - CJT (pb) [Entry date 03/21/96]

DATE	NO.	PROCEEDINGS
3/21/96	72	MEMORANDUM (BRIEF) by plaintiff in support of motion for pretrial conference [71-1] - CJT (pb) [Entry date 03/21/96]
3/21/96	73	SETTING LETTER settlement conference set for 9:30 4/3/96 before Judge Breen - MEMPHIS (skp) [Entry date 03/21/96]
3/27/96	74	ORDER by Judge D. Todd denying motion to limit venire [46-1] - CJT (cc: all counsel) (pb) [Entry date 03/28/96]
3/29/96	75	SUPPLEMENTAL MEMORANDUM by defendant Norfolk So. Railway re motion for summary judgment [41-1] w/attmts Exhs: A. aft of Mike Selig; B. afdt of Newton McCormick, Jr.; C. order from USDC/WD-TN (Mphs)- CJT (pb) [Entry date 03/30/96]
3/29/96	75	RESPONSE by defendant Norfolk So. Railway to motion for summary judgment [39-1] w/attd Exhs: A. afdt of Mike Selig; B. afdt of Newton McCormick, Jr.; C. order from USDC/WD-TN (Mphs) - CJT (pb) [Entry date 03/30/96]
3/29/96	76	STATEMENT of undisputed material facts by defendant Norfolk So. Railway w/attmt Exh: A. excerpt from depo of Dedra Shanklin (pb) [Entry date 03/30/96]
4/1/96	77	RESPONSE by plaintiff to dft's reply to plt's memorandum in opposition to dft's motion for sum jgm w/Exhs: 1. appeal brief; 2. excerpt from depo of Bernard Abrams; 3. photo (cpy); 4. Fed RR Admin report; 5. excerpt from depo of William E. Martin; 6. except from depo of Jack H. Landers, Jr.; 7. photos (cpy); 8. excerpt from depo of Christopher McAnally - CJT (pb) [Entry date 04/01/96]

DATE	NO.	PROCEEDINGS
4/1/96	78	REPLY by plaintiff to response to motion for summary judgment [39-1] w/attd Exhs: A. supplemental afdt of Archie Burnham and excerpt from the RR-Hwy Grade Crossing Handbook; B. excerpt from depo of Steven B. Driskell - CJT (pb) [Entry date 04/01/96]
4/1/96	79	RESPONSE by plaintiff to dft's reply memorandum in support of dft's motion to limit venire w/attd letter printed in the Commercial Appeal - CJT (pb) [Entry date 04/01/96]
4/4/96	80	ORDER by Judge James D. Todd partially granting and partially denying motion in limine re photographs, cmplts about crossing, etc. [48-1] - CJT (cc: all counsel) (pb) [Entry date 04/05/96]
4/4/96	81	MINUTES: Settlement conference: settlement conf ddl satisfied; case not settled, and terminating case referral (pb) [Entry date 04/05/96]
4/8/96	82	SUPPLEMENT by plaintiff to memorandum in opposition to dft's motion for sum jgm w/attd opinion from USDC SD/MS - CJT (pb) [Entry date 04/10/96]
4/11/96	83	JOINT PRE-TRIAL ORDER approved by Judge James D. Todd: - CJT (cc: all counsel) (pb) [Entry date 04/12/96]
4/17/96	84	ORDER by Judge James D. Todd partially granting and partially denying motion for summary juudgment [41-1]—GRANTED as to plt's excessive speed and "ditch light" claims—DENIED as to plt's inadequate horn and braking, vegetation, and inadequate warning devices claims; denying motion for summary juudgment [39-1] - CJT, OB (cc: all counsel) (pb) [Entry date 04/18/96]

DATE	NO.	PROCEEDINGS
4/25/96	85	MOTION by miscellaneous parties Nelson Christianson III, Terry Cantrell to quash subpoenas, and for expedited hearing w/ attd Exhs: A-B. cpys of subpoenas; C-E. afdts of Nelson Christianson III, Alvin Pearson and Mary Moody - CJT (pb) [Entry date 04/26/96] [Edit date 04/30/96]
4/26/96	86	PRE-TRIAL BRIEF FILED by defendant Norfolk So. Railway - CJT (pb) [Entry date 04/26/96]
4/26/96	87	OBJECTIONS by defendant Norfolk So. Railway to plt's exhibits - CJT (pb) [Entry date 04/26/96]
4/29/96	88	RESPONSE (MEMORANDUM IN OPPOSITION) by defendant Norfolk So. Railway to motion to quash subpoenas [85-1], to motion for expedited hearing [85-2] - CJT (pb) [Entry date 04/29/96]
4/29/96	89	AFFIDAVIT of atty Everett B. Gibson re motion response [88-1] - CJT (pb) [Entry date 04/29/96]
4/29/96	90	MINUTES: 9:50 - 10:10 Hearing - Arguments heard; motion to quash subpoenas [85-1] denied, re [85-2] (pb) [Entry date 04/30/96]
4/29/96	91	MINUTES: 10:10 - 5:15 Jury trial began, and; Jury trial ddl satisfied 4/29/96. Adj til 9:30am 5-1-96. (pb) [Entry date 04/30/96]
5/1/96	92	DEPOSITION (1 orig) of Bernard S. Abrams, O.D. taken on the following date(s): January 10, 1996 (pb) [Entry date 05/01/96]

DATE	NO.	PROCEEDINGS
5/1/96	93	MEMORANDUM by defendant Norfolk So. Railway in support of motion to exclude the testimony of Bernard S. Abrams, O.D. (Jksn clerk's office called Mphs clerk's office and Mr. Gibson re whether or not motion was filed) [Memorandum was filed in Mphs and recd in Jkson 5/2/96] - CJT (pb) [Entry date 05/06/96]
5/1/96	94	MINUTES: 9:30-4:55 Jury trial resumed. Stipulation that dft owns track and that it was a class 4 track. Testimony continues. 4:30pm Dfts proof. Adj. 4:55 til 9:00 am 5/2/96. (pb) [Entry date 05/06/96]
5/2/96	95	MINUTES: 9:15-11:50 Jury trial resumed. Adj. til 9:30am 5/6/96. (pb) [Entry date 05/06/96]
5/6/96	96	DEPOSITION of Steven Bruce Driskell taken on the following date(s): September 22, 1995 (pb) [Entry date 05/07/96]
5/6/97	97	MINUTES: 9:40-4:30 Jury trial resumed. Testimony continues: 1:55pm Dft rest; 2:00 Plt rest. Out of presence of jury; dfts' motion for jgmt as a matter of law—denied, except to punitive damage claim. Adj. 4:30pm til 9:30am 5/7/96. (pb) [Entry date 05/13/96]
5/7/96	98	MINUTES: 9:40 Jury trial continues. 11:25 —queston from jury; 2:15—question from jury. Verdict returned—3:00 in favor of plt. Jury trial ended. Adj. 3:10pm (pb) [Entry date 05/13/96] [Edit date 05/14/96]
5/7/96	—	REMARK - note from jury (pb) [Entry date 05/13/96]
5/7/96	—	REMARK - note from jury (pb) [Entry date 05/13/96]

DATE	NO.	PROCEEDINGS
5/7/96	99	VERDICT for plaintiff Dedra Shanklin against defendant Norfolk So. Railway. (pb) [Entry date 05/13/96] [Edit date 05/14/96]
5/7/96	102	EXHIBIT AND WITNESS list (pb) [Entry date 05/13/96]
5/7/96	103	JUDGMENT: by Judge James D. Todd terminating case. - CJT, OB (cc: all counsel) (pb) [Entry date 05/14/96]
5/8/96	100	REQUESTED JURY INSTRUCTIONS submitted by defendant Norfolk So. Railway (pb) [Entry date 05/13/96]
5/8/96	101	REQUESTED JURY INSTRUCTIONS submitted by plaintiff Dedra Shanklin (pb) [Entry date 05/13/96]
5/17/96	104	MOTION by defendant Norfolk So. Railway for leave to file supplmtl brief (filed Mphs; recd Jksn 5/21/96) - CJT wpo (pb) [Entry date 05/22/96]
5/17/96	105	MEMORANDUM by defendant Norfolk So. Railway in support of motion for leave to file supplmtl brief [104-1] (filed Mphs; recd Jksn 5/21/96) - CJT (pb) [Entry date 05/22/96]
5/17/96	106	CERTIFICATE by atty for defendant Norfolk So. Railway (filed Mphs) - CJT (pb) [Entry date 05/22/96]
5/17/96	107	MOTION by defendant Norfolk So. Railway for judgment notwithstanding verdict or, in the alternative, for a new trial (filed Mphs) - CJT (pb) [Entry date 05/22/96]
5/17/96	108	MEMORANDUM by defendant Norfolk So. Railway in support of motion for judgment notwithstanding verdict [107-1], of motion for a new trial [107-2] (filed Mphs) - CJT (pb) [Entry date 05/22/96]

DATE	NO.	PROCEEDINGS
5/29/96	109	ORDER by Judge James D. Todd granting motion for leave to file supplmtl brief [104-1] w/i five (5) das from receipt of the evidentiary transcript. Plt may have twenty (20) das to respond to the brief and supplmtl brief. Plt need not respond to the original brief until the supplmtl brief has been filed and may file a single response to both briefs - CJT (cc: all counsel) (pb) [Entry date 05/29/96]
5/30/96	110	RESPONSE by plaintiff to motion for judgment notwithstanding verdict [107-1], to motion for a new trial [107-2] - CJT wpo (pb) [Entry date 05/31/96]
5/30/96	111	RESPONSE by plaintiff to dft's motion for leave to file supplmtl brief [104-1] - CJT wpo (pb) [Entry date 05/31/96]
5/30/96	112	BILL OF COSTS submitted by plaintiff re [103-2] - CJT, cpy to Clerk (pb) [Entry date 05/31/96]
6/4/96	113	OBJECTIONS by defendant Norfolk So. Railway to bill of costs [112-1] - CJT (pb) [Entry date 06/06/96]
6/5/96	114	MOTION by plaintiff to require payment of expert fees - CJT (pb) [Entry date 06/06/96]
6/5/96	115	MEMORANDUM by plaintiff in support of motion to require payment of expert fees [114-1] w/attd Exhs: 1. afdt. of Pamela R. O'Dwyer; A-B. ltrs; 2. ltr; 3. afdt of Bernard S. Abrams: A. excerpt fr depo of Bernard S. Abrams, O.D., B. stmt re expert witness service fees - CJT (pb) [Entry date 06/06/96]

DATE	NO.	PROCEEDINGS
6/11/96	116	SETTING LETTER: taxation of cost by the Clerk set for 07/10/96 at 10:45 Rm 101 Fed Bldg Jackson (bph) [Entry date 06/12/96]
6/21/96	117	MOTION by defendant Norfolk So. Railway to extend time to respond to motion to require payment of expert fees - CJT (skp) [Entry date 06/25/96]
6/21/96	118	MEMORANDUM by defendant Norfolk So. Railway in support of motion to extend time to respond to motion to require payment of expert fees [117-1] - CJT (filed Mphs) (skp) [Entry date 06/25/96] [Edit date 06/25/96]
6/21/96	119	CERTIFICATE of counsel Ralph T. Gibson - CJT (skp) [Entry date 06/25/96]
6/25/96	120	ORDER by Judge James D. Todd granting motion to extend time to respond to motion to require payment of expert fees [117-1] - dfdt granted extension of 25 days (cc: all counsel) (ejs) [Entry date 06/26/96]
6/28/96	121	SETTING LETTER: Cost assessment hrg reset for 7/9/96 at 10:45 (skp) [Entry date 06/28/96]
7/8/96	122	RESPONSE to defendant's objections to plaintiff's bill of costs [113-1] CJT, cpy faxed Mr. Di Trolio (bph) [Entry date 07/08/96]
7/8/96	—	REMARK - Rcd TC from Ann of Atty Pamela O'Dwyer office - Ms. O'Dwyer will not be present for cost hearing on 7/9/96 (skp) [Entry date 07/08/96]
7/15/96	123	TRANSCRIPT (5 VOLS.) filed of trial proceedings on April 29, 1996 and May 1, 2, 6, 7, 1996 (Clerk's cpy) (pb) [Entry date 07/15/96]

DATE	NO.	PROCEEDINGS
7/15/96	124	TRANSCRIPT (1 VOL.) filed of plt's closing arguments on May 7, 1996 (Clerk's cpy) (pb) [Entry date 07/15/96]
7/18/96	125	TRANSCRIPT filed of Opening Statement on April 29, 1996 (Clerk's cpy) (pb) [Entry date 07/19/96]
7/22/96	126	SUPPLEMENTAL MEMORANDUM by defendant Norfolk So. Railway re motion for judgment notwithstanding verdict [107-1], re motion for a new trial [107-2] - CJT (pb) [Entry date 07/23/96]
7/23/96	127	ORDER TAXING COSTS by Robert R. Di Trolio, Clerk. Costs are taxed against Defendant and in favor of plt for the amt of $3,763.39 - CJT (cc: all counsel) (pb) [Entry date 07/24/96] [Edit date 07/24/96]
7/24/96	128	ORDER by Judge James D. Todd granting motion to require payment of expert fees [114-1] w/o prejudice to refiling - CJT (cc: all counsel) (pb) [Entry date 07/25/96]
7/29/96	129	NOTICE (APPEAL FROM ORDER TAXING COSTS) by defendant Norfolk So. Railway (filed Mphs) - CJT, Clerk (pb) [Entry date 07/31/96]
7/31/96	130	MOTION by plaintiff for review (of order taxing costs w/attd receipts - CJT, Clerk (pb) [Entry date 07/31/96]
8/8/96	131	CONSENT ORDER EXTENDING TIME by Judge James D. Todd:. Plt allowed up to and incl 8/26/96 to respond to dft's supplmtl memorandum - CJT (cc: all counsel) (pb) [Entry date 08/08/96]

DATE	NO.	PROCEEDINGS
8/26/96	132	RESPONSE (SUPPLEMENTAL MEMORANDUM IN OPPOSITION) by plaintiff to motion for judgment notwithstanding verdict [107-1], to motion for a new trial [107-2] w/attd App. 1: Supreme Ct decisions; 2. USDC ED/LA order and reasons - CJT (pb) [Entry date 08/28/96]
9/9/96	133	ORDER by Judge James D. Todd granting in part the motion for review (of order taxing costs [130-1] (Court approves clerk's taxation of $120.00 ff; $2,874.93 in deposition costs; $107.42 in exemplification and copy fees. Cost are also taxes in the amount of $400.00 for witness fees; $810.54 in witness travel expenses. Therefore, costs are taxed against dft and in favor of the pla in the total amount of $4,312.89) (cc: JT, info to clerk, all counsel) (gn) [Entry date 09/09/96]
9/13/96	134	ORDER by Judge James D. Todd denying motion for judgment notwithstanding verdict [107-1], denying motion for a new trial [107-2] - CJT (cc: all counsel) (pb) [Entry date 09/16/96]
9/25/96	135	NOTICE OF APPEAL by defendant Norfolk So. Railway from Dist. Court decision, jgmt [103-2]; order [134-1] - CJT (cc: all counsel) (pb) [Entry date 09/30/96]
9/25/96	—	RECEIVED re appeal [135-1] fee in amount of $105.00 (Receipt #17578) (pb) [Entry date 09/30/96]
10/10/96	—	REMARK - cpy ntc of appeal mailed COA w/2TForms, cert ds and cpy of #s 15, 84, 103, 134 (pb) [Entry date 10/10/96]

DATE	NO.	PROCEEDINGS
10/18/96	—	REMARK - cpy of Jury Verdict (docket entry #99) mailed COA w/2TForms and cert ds (pb) [Entry date 10/18/96]
10/23/96	—	NOTIFICATION by 6th Circuit Court Number 96-6371 (pb) [Entry date 10/24/96]
11/4/96	—	NOTIFICATION by 6th Circuit Court Number 96-6371 (pb) [Entry date 11/05/96]
9/10/97	—	ORIGINAL record on appeal transmitted to 6th Circuit consisting of 5 vol(s) pleadings: 7 vol(s) transcripts: 5 vol(s) deposition: w/cert copy of docket sheet and 2 transmission forms. (cc: copies to all counsel) [135-1] (pb) [Entry date 09/10/97] [Edit date 09/10/97]
4/19/99	136	JUDGMENT AND SLIP opinion from USCA filed 4/13/99 affirming the decision of the District Court [135-1] (pb) [Entry date 04/20/99]
4/26/99	137	BILL OF COSTS for appeal submitted by plaintiff/appellee Dedra Shanklin re judgment [103-2]. Amt. $821.20 for trial transcripts - CJT (pb) [Entry date 04/27/99]
7/7/99	—	ORIGINAL RECORD on appeal returned from 6th Circuit consisting of 5 pls; 7 tr; 5 depos (pb) [Entry date 07/07/99]
9/7/99	—	REMARK - ntc fr US Supreme Ct of filing of petition for writ of certiorari 8/20/99; dkt #99-312. (pb) [Entry date 09/08/99]
10/25/99	138	NOTICE OF FILING OF notification from US Supreme Court - petition for writ of certiorari is granted (ejc) [Entry date 10/26/99]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-6371

DEDRA SHANKLIN,
Plaintiff-Appellee,
v.

NORFOLK SOUTHERN RAILWAY COMPANY, *et al.*,
Defendants-Appellants.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/18/96	Civil Case Docketed. Notice filed by Appellant Norfolk Southern Railway Company. Transcript needed: y (mcp)
10/25/96	APPEARANCE filed by Attorney Pamela R. O'Dwyer for Appellee Dedra Shanklin [96-6371] (mcp)
11/4/96	APPEARANCE filed by Attorney Everett Gibson for Appellant Norfolk So Ry Co [96-6371] (mcp)
11/4/96	PRE-ARGUMENT STATEMENT filed by Everett Gibson for Appellant Norfolk So Ry Co [96-6371] (mcp)
11/4/96	TRANSCRIPT ORDER FORM filed by Everett Gibson for Appellant Norfolk So Ry Co: Transcript on file in district court. [96-6371] [1417893-1] (blh)

DATE	PROCEEDINGS
1/7/96	BRIEFING LETTER SENT setting briefing schedule: appellant "proof" brief due 12/17/96; appellee "proof" brief due 1/16/97; reply brief due 1/30/97; appendix due 2/6/97; appellant & appellee's "final" brief due 2/27/97; [96-6371]. (mcp)
11/19/96	Pre-Argument Conference work complete. (wjr)
12/19/96	PROOF BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 12/17/96 Number of Pages: 75. [96-6371] (mcp)
12/19/96	Request to require oral argument (page 1) filed by Everett Gibson for Appellant Norfolk So Ry Co [96-6371] (mcp)
12/27/96	BRIEFING LETTER SENT requesting Everett Gibson a Designation of Appendix Contents. And also informing counsel that when the "final" brief is filed, the references to the record be placed in parenthesis ( ). Designation due: 1/6/97 . (mcp)
1/15/97	Appellant MOTION filed with affidavit in support, to file appendix designation out-of-time. [1454247-1]. Motion filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 1/14/96 [96-6371] (mcp)
1/16/97	LETTER SENT by mcp granting motion to file appendix designation out-of-time [1454247-1] motion filed by Everett Gibson [96-6371] (mcp)
1/16/97	APPEARANCE filed by Attorney Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc [96-6371] (mcp)
1/16/97	Amicus MOTION filed to allow The Association of Trial Lawyers of America to file an amicus curiae brief in support of appellee. Motion filed by Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc. Certificate of service date 1/15/97. [96-6371] (mcp)

DATE	PROCEEDINGS
1/16/97	BRIEF TENDERED. Received from Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc [96-6371]. Certificate of service date 1/15/97. (mcp)
1/16/97	AMICUS BRIEF filed by Jeffrey Robert White for Amicus Curiae Trial Lawyers Assoc. Copies 7. Certificate of service date 1/15/97. Number of Pages: 25. [96-6371] (mcp)
1/17/97	PROOF BRIEF filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 1/15/97. Number of Pages: 87. [96-6371] (mcp)
1/17/97	Request to require oral argument (page 2) filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin [96-6371] (mcp)
1/21/97	BRIEFING LETTER SENT requesting brief corrections from Pamela R. O'Dwyer because Summary of Argument is required. Corrections due: 1/31/97. (mcp)
1/29/97	Amicus MOTION filed to allow Association of American Railroad for leave to file amicus curiae brief in support of appellant Norfolk Southern Railway Company. Motion filed by James Lacey O'Connell for Amicus Curiae AAR. Certificate of service 1/29/97. [96-6371] (mcp)
1/29/97	BRIEF TENDERED. Received from James Lacey O'Connell for Amicus Curiae AAR [96-6371]. Certificate of service date 1/29/97. (mcp)
1/29/97	AMICUS BRIEF filed by James Lacey O'Connell for Amicus Curiae AAR. Copies 7. Certificate of service date 1/29/97. Number of Pages: 20. [96-6371] (mcp)

DATE	PROCEEDINGS
2/3/97	"PROOF" REPLY BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co Copies: 1. Certificate of service date 1/30/97 [96-6371] (mcp)
2/11/97	APPEARANCE filed by Attorney James Lacey O'Connell for Amicus Curiae Association of American Railroads (AAR) [96-6371] (mcp)
2/11/97	Amicus MOTION filed to file amicus brief out-of-time. Motion filed by James Lacey O'Connell for Amicus Curiae AAR. Certificate of service date 2/11/97. [96-6371] (mcp)
2/13/97	APPENDIX TENDERED. Received from Everett Gibson for Appellant Norfolk So Ry Co. [96-6371] Copies: 5 (2 Volumes). Certificate of service date Corrections to be made: no certificate of service, index to list all exhibits and all documents to be listed separately; due 3/6/97 for Everett Gibson (ds)
2/13/97	APPENDIX filed by Everett Gibson for Appellant Norfolk So Ry Co. Copies: 5 (2 Volumes). Certificate of service date 3/27/97. [96-6371] (ds)
2/18/97	Appellee RESPONSE in opposition filed regarding a motion to allow amicus curiae to appear [1468-798-1] previously filed by James Lacey O'Connell for Association of American Railroads. Response from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 2/13/97 [96-6371] (mcp)
2/18/97	Appellee MOTION filed for leave to file amended designation of appendix contents. [1471953-1]. Motion filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 2/14/97. [96-6371] (mcp)
2/25/97	LETTER SENT by mcp granting motion for leave to file amended designation of appendix contents [1471953-1] filed by Pamela R. O'Dwyer [96-6371] (mcp)

DATE	PROCEEDINGS
3/3/97	FINAL BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co. Copies: 7. Certificate of service date 2/27/97 Number of Pages: 74. [96-6371] (mcp)
3/3/97	FINAL REPLY BRIEF filed by Everett Gibson for Appellant Norfolk So Ry Co. Copies: 7 Certificate of service date 2/27/97 Number of Pages: 28. [96-6371] (mcp)
3/4/97	BRIEFING LETTER SENT resetting briefing schedule: appellant final brief due now 3/28/97; appellee final brief now due 3/28/97 [96-6371]. (ds)
4/1/97	BRIEFING LETTER SENT resetting briefing schedule: Since appellee is now is receipt of the corrected joint appendix, the appellee final brief has been extended to 4/21/97. [96-6371]. (mcp)
4/23/97	Request to require oral argument (page 2) filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin [96-6371] (mcp)
4/24/97	FINAL BRIEF filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Copies: 7. Certificate of service date 4/21/97. Number of Pages: 94. [96-6371] (mcp)
7/3/97	Appellee MOTION filed for permission to file reply brief to the brief of amicus curiae filed by Association of American Railroads (AAR). [1554853-1]. Motion filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 6/30/97. [96-6371] (mcp)
7/3/97	APPELLEE REPLY BRIEF TENDERED. Reply to the amicus brief of amicus curiae Association of American Railroads. Reply brief received from Pamela R. O'Dwyer for Appellee Dedra Shanklin. [96-6371] Copies: 7. Pages 67. Certificate of service date 6/30/97 (mcp)

DATE	PROCEEDINGS
7/3/97	REPLY BRIEF filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Reply brief to amicus brief of Association of American Railroads (AAR). Copies: 7. Certificate of service date 6/30/97. Number of Pages: 64. [96-6371] (mcp)
8/28/97	Oral argument date set for 10/27/97 in court room 607. Notice of argument sent to counsel. [96-6371] (paw)
9/10/97	ORDER filed granting motion to allow The Association of Trial Lawyers to file an amicus brief [1456154-1] filed by Jeffrey Robert White, granting motion to allow Association of American Railroad to file an amicus brief [1468798-1] and granting motion to file the amicus brief out-of-time [1468805-1] filed by James Lacey O'Connell, granting motion of appellee for permission to file reply brief to intervenor Association of American Railroads [1554853-1] filed by Pamela R. O'Dwyer [96-6371]. Entered by order of the court. (mcp)
9/19/97	Appellant MOTION with memorandum in support filed to take judicial notice. Motion filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 9/16/97 [96-6371] (mcp)
9/22/97	CERTIFIED RECORD filed. Volumes include 7 Tr; 5 Dep; 5 Pl. [96-6371] (pje)
9/29/97	Appellee MEMORANDUM in opposition filed regarding a motion to take judicial notice and in support of the filing of appellee's-supplemental authorities, motion to take judicial notice [1596725-1] previously filed by Everett Gibson. Response from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date [96-6371] (mcp)
10/8/97	ORDER filed granting motion to take judicial notice [1596725-1] filed by Everett Gibson. Entered by order of the court. (mcp)

DATE	PROCEEDINGS
10/14/97	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 10/9/97 [96-6371] (mcp)
10/20/97	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 10/17/97 [96-6371] (mcp)
10/27/97	Date previously set for oral argument is cancelled. [96-6371] (me)
11/10/97	Appellee MOTION filed requesting oral argument via telephone or to expedite oral argument. Motion filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 11/7/97. [96-6371) (mcp)
11/14/97	LETTER SENT by mcp to appellant counsel requesting response to previously motion for telephonic argument or expedited oral argument [1626209-1,2] by Pamela R. O'Dwyer. Response due by 11/24/97 for Everett Gibson. [96-6371] (mcp)
11/25/97	Appellant RESPONSE filed with affidavits in support, in opposition regarding a motion requesting telephone argument [1626209-1] and no objection regarding a motion to expedite oral argument [1626209-2], motions previously filed by Pamela R. O'Dwyer. Response from Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 11/22/97. [96-6371] (mcp)
12/8/97	ORDER filed denying motion requesting telephonic argument [1626209-1] or expedited oral argument [1626209-2] motion filed by Pamela R. O'Dwyer [96-6371]. James L. Ryan, Circuit Judge, Alice M. Batchelder, Circuit Judge, Eric L. Clay, Circuit Judge. (mcp)
1/13/98	Oral argument date set for 2/5/98 in court room 403. Notice of argument sent to counsel. [96-6371] (paw)

DATE	PROCEEDINGS
2/5/98	CAUSE ARGUED on 2/5/98 by Everett Gibson for Appellant Norfolk So Ry Co, Pamela R. O'Dwyer for Appellee Dedra Shanklin before Judges Batchelder, Moore, Clay. [96-6371] (paw)
2/27/98	Attorney LETTER filed concerning citation at oral argument. Letter from Everett Gibson. Certificate of service date 2/25/98 [96-6371] (yh)
3/18/98	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 3/14/98. [96-6371] (mcp)
3/23/99	Appellee RESPONSE filed regarding additional citations filed by appellant. Response from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 3/19/98 [96-6371) (mcp)
3/27/98	Appellee LETTER filed regarding paragraph omitted from response of 3/19/98 (filed 3/23/98). [96-6371]. Letter from Pamela R. O'Dwyer for Appellee Dedra Shanklin. Certificate of service date 3/25/98 [96-6371] (mcp)
7/23/98	ADDITIONAL CITATION filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 7/22/98 [96-6371] (mcp)
4/13/98	OPINION filed: The decision of the district court is AFFIRMED in all respects, decision for publication pursuant to local rule 206 [96-6371]. Alice M. Batchelder, Authoring Judge, Karen N. Moore, Circuit Judge, Eric L. Clay, Circuit Judge. (mcp)
4/13/99	JUDGMENT: The judgment of the district court is AFFIRMED in all respects. (mcp)
4/22/99	BILL OF COST filed by Pamela R. O'Dwyer for Appellee Dedra Shanklin. Amount: $149.20. Certificate of service date 4/20/99. [96-6371] (mcp)
4/27/99	PETITION for en banc rehearing filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 4/27/99. [96-6371] (blh)

DATE	PROCEEDINGS
5/10/99	Errata to petition for rehearing en banc filed 04/27/99 by Everett Gibson for Appellant Norfolk So Ry Co. [96-6371] (blh)
5/24/99	ORDER filed denying petition for en banc rehearing [1932511-1] filed by Everett Gibson [96-6371]. Alice M. Batchelder, Karen N. Moore, Eric L. Clay, Circuit Judges. (blh)
6/1/99	Appellant MOTION filed staying issuance of mandate pending the filing of a petition for writ of certiorari. Motion filed by Everett Gibson for Appellant Norfolk So Ry Co. Certificate of service date 6/1/99 [96-6371] (mcp)
6/9/99	ORDER filed granting motion to stay mandate [1952760-1] filed by Everett Gibson. The mandate is stayed for 90 days from this order unless the court is advised that the petition for writ of certiorari has been filed. [96-6371] Alice M. Batchelder, Circuit Judge, Karen N. Moore, Circuit Judge, Eric L. Clay, Circuit Judge. (mcp)
6/29/99	CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [96-6371]. Volumes included: 5 Pl; 7 Tr; 5 Dep. (dag)
7/9/99	Record acknowledgment received from the district court. Acknowledged by: Barbara Hearn. Acknowledgment date: 7/7/99. [96-6371] (mcp)
8/30/99	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Norfolk So Ry Co. Filed in the Supreme Court on 08-20-99, Supreme Ct. case number: 99-312. [96-6371] (swh)
10/22/99	U.S. Supreme Court letter filed granting petition for writ of certiorari [2005114-1] filed by Norfolk So Ry Co [96-6371]. Filed in the Supreme Court on 10-18-99. (swh)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Civil No. 94-1212
Jury Demand
Judge Todd

DEDRA SHANKLIN,
individually and as next friend of her son
JESSIE GUY SHANKLIN

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
NORFOLK SOUTHERN CORPORATION,
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.

COMPLAINT

Comes the Plaintiff and sues the Defendants and for her cause of action would show unto the Court as follows:

I. JURISDICTION

1. The jurisdiction of this Court is invoked by the Plaintiff pursuant to Diversity of Citizenship as provided by 28 U.S.C. 1322, for a cause in excess of the jurisdictional limits.

II. NATURE OF PROCEEDINGS

2. This is an action for damages for the wrongful death of the Plaintiff's husband resulting from the negli-

gence of the corporation in their policy making and in the training of their employees and in the operation of their equipment.

III. THE PARTIES

3. Plaintiff is the widow of Eddie Shanklin and the mother of his child Jessie. She is a resident of Gibson County, Tennessee. She brings this action under the wrongful death statute, T.C.A. 20-5-106.

4. The Defendant Norfolk Southern Railway Company is a Virginia corporation doing business in Gibson County, Tennessee as an interstate carrier by rail. Norfolk Southern Corporation is a Virginia corporation which is a holding company and owns the stock of Norfolk Southern Railway Company. Cincinnati, New Orleans & Texas Pacific Ry. Co. is an Ohio Corporation doing business as an interstate carrier by rail in Gibson County. Hence forth in this complaint the defendants will be referred to as Norfolk Southern.

5. At all times material to this action the Defendant owned or leased the trackage in Gibson County, Tennessee which is intersected at the crossing by Oakwood Road and operated their railroad for the financial benefit of all corporate defendants in pursuit of interstate commerce.

IV. FACTUAL BASIS OF PLAINTIFF'S CLAIMS

6. On or about the 3rd day of October, 1993 at dawn (5:15), the Plaintiff's husband Eddie Shanklin was traveling in his automobile east on Oakwood Road at the location where it intersects the main line of track being used by the Defendant Norfolk Southern when he was struck broadside and was killed by the train being negligently operated by the Defendants as follows:

COMMON LAW NEGLIGENCE;

7a. Norfolk Southern failed to provide an adequate warning system or protective devices at the crossing in question, though they were aware of the ultra or extra hazardous local condition and its inherent danger to the unsuspecting motorist expected to use said crossing.

b. Norfolk Southern failed to sound the horn on said train as it approached the crossing within a reasonable time to give adequate warning to Mr. Shanklin so that he might stop before attempting to cross the track.

c. Norfolk Southern set its train speed and operated the train across the crossing under the highly dangerous conditions when it knew or ought to have known the unsuspecting motorists could be in a position of peril.

d. Under the circumstances of this crossing, Norfolk Southern operated the engine and train without keeping what a reasonable person would deem to be a proper lookout ahead considering all the factors which the defendants knew or ought to have known and failed to timely apply the brakes and reduce the speed under the circumstances as they approached the crossing.

e. Norfolk Southern failed to properly and carefully train and instruct and supervise the crew to avoid just such an eventuality as this incident presented.

f. Norfolk Southern failed to properly and carefully make policies to protect the traveling public, specifically this plaintiff's husband and did fail to make and implement appropriate policies or measures which were inexpensive and readily available including but not limited to the closure of this crossing and the negligent failure to signalize beyond the "next to nothing" protection afforded by "cross-bucks" and the notify the State Department of Transportation and to request that permission be granted to either close the crossing or that the Department designate the type of signals to be installed.

g. The crew of the train operated the train negligently in violation of the operating and safety rules and time-table of the defendant railroad.

h. any violations of the suggestions or requirements of the Manual on Uniform Traffic Control Devices which apply to the subject crossing.

i. failure to provide a safe sight distance for the Plaintiff's husband by reducing the height of any embankment and or clearing the vegetation from the existing bank.

STATUTORY VIOLATIONS

8a. T.C.A. 65-6-122

failure to construct and maintain the railroad tracks so that vehicles could conveniently and safely pass over same.

b. T.C.A. 65-11-101

failure to make, furnish and maintain a sufficient crossing at a public highway and keep the same in lawful repair.

c. T.C.A. 65-12-108(1) & (2)

failure to cause the train in question to sound its whistle or bell at a distance of one quarter of a mile from the crossing.

d. T.C.A. 65-12-108(4)

failure to implement the precautions required for prevention of accidents.

e. T.C.A. 65-11-113

failure to provide automatic warning or protective devices and not to exceed 25 m.p.h. speed limit in the interim.

f. T.C.A. 65-6-132

failure to cut down trees.

g. T.C.A. 65-11-103

failure to construct, maintain, and repair.

h. T.C.A. 65-12-108(3)

failure to keep a proper lookout ahead.

i. T.C.A. 65-12-109

makes a violation of 65-12-108 "Negligence Per Se".

V. DAMAGES

9. As a direct and proximate foreseeable result of the willful, wanton, gross negligence of the Defendants the Plaintiff's husband suffered pain and anguish in his dying and she has suffered financial loss, incurred expenses and has lost the right to her husband's support and consortium entitling her to recover compensatory and punitive or exemplary damages and pre and post-judgment interest in the maximum amounts allowed by law.

VI. PRAYER FOR RELIEF
WHEREFORE PREMISES CONSIDERED THE PLAINTIFF PRAYS

10 a. That proper process issue and be served upon the Defendant's requiring them to appear and answer within the time allowed by law.

b. That upon the trial of this matter, Plaintiff recover judgment against the Defendants, jointly and severally, for those damages set forth herein, as well as their court costs, prejudgment and post-judgment interest in the maximum allowed by law and for such other and further relief,

both general and special, at low or in equity to which Plaintiff may be justly entitled to recover.

c. PLAINTIFF DEMANDS A JURY TO TRY THE ISSUES WHEN JOINED.

PATY, RYMER AND ULIN P C

By: /s/ Pamela Rymer O'Dwyer
PAMELA RYMER O'DWYER
19 Patten Parkway
Chattanooga, Tn 37402
(615) 756-6770

WAIVER OF SERVICE OF SUMMONS

TO: Pamela R. O'Dwyer

I acknowledge receipt of your request that I waive service of a summons in the action of Dedra Shanklin v. Norfolk Southern Company, et al, which is case number 94-1212 in the United States District Court for the Western District of State of Tennessee. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after 9-26-94, or within 90 days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/Typed Name: _____

As _____ of _____

(Title) (Corporate Defendant)

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

WAIVER OF SERVICE OF SUMMONS

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I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after 9-26-94, or within 90 days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/Typed Name: _____

As _____ of _____

(Title) (Corporate Defendant)

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NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

TO: (A) John S. Shannon, 3 Commercial Place, Norfolk, VA 23510-2191

as (B) Executive Vice President

of (C) Norfolk Southern Corporation

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed.) A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the (D) Western District of Tennessee and has been assigned docket number (E) 94-1212.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within (F) 30 days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States.)

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth at the foot of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this 26th day of September, 94.

/s/ Pamela Rymer O'Dwyer
Signature of Plaintiff's Attorney
or Unrepresented Plaintiff

A—Name of individual defendant (or name of officer or agent of corporate defendant)

B—Title, or other relationship of individual to corporate defendant

C—Name of corporate defendant, if any

D—District

E—Docket number of action

F—Address must be given at least 30 days (60 days if located in foreign country) in which to return waiver

NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

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of (C) Norfolk Southern Corporation

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed.) A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the (D) Western District of Tennessee and has been assigned docket number (E) 94-1212.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within (F) 30 days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States.)

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth at the foot of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this 26th day of September, 94.

/s/ Pamela Rymer O'Dwyer
Signature of Plaintiff's Attorney
or Unrepresented Plaintiff

A—Name of individual defendant (or name of officer or agent of corporate defendant)

B—Title, or other relationship of individual to corporate defendant

C—Name of corporate defendant, if any

D—District

E—Docket number of action

F—Address must be given at least 30 days (60 days if located in foreign country) in which to return waiver

[Filed Oct. 17, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Caption Omitted in Printing)

ANSWER OF DEFENDANT
NORFOLK SOUTHERN RAILWAY COMPANY

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

In answer to the numbered paragraphs of the complaint, defendant, Norfolk Southern Railway Company ("Norfolk Southern"), states as follows:

1. Norfolk Southern admits the allegations contained in paragraph 1 of the complaint.

2. Norfolk Southern admits the nature of the action as alleged in paragraph 2 of the complaint, but denies negligence on its part or on the part of its employees.

3. Norfolk Southern admits the allegations contained in paragraph 3 of the complaint.

4. Norfolk Southern admits the allegations contained in paragraph 4 of the complaint except as to Cincinnati, New Orleans & Texas Pacific Railway Company.

5. Norfolk Southern admits the allegations as to it in paragraph 5 of the complaint except that its rail operations are conducted for the benefit of its shareholders.

6. Norfolk Southern admits that a fatal accident occurred at the time and place alleged in paragraph 6 of the complaint. Norfolk Southern denies negligence on its part.

7. Norfolk Southern denies the allegations contained in paragraph 7 of the complaint.

8. Norfolk Southern admits that the statutes set forth in paragraph of the complaint were in full force and effect at the time and place of the accident, but Norfolk Southern denies that it violated any such statutes.

9. Norfolk Southern denies the obligations contained in paragraph 9 of the complaint.

THIRD DEFENSE

1. The accident and resulting fatality were caused solely by the negligence of Eddie Shanklin in that at the time and place of the accident, Eddie Shanklin failed to keep his vehicle under proper control, failed to devote full time and attention to the operation of his vehicle, failed to keep a proper lookout ahead, and failed to bring his vehicle to a stop when he knew or in the exercise of ordinary care should have known that a train was approaching the crossing in hazardous proximity to the crossing.

2. Plaintiff is therefore barred from recovery in this cause under the doctrine of comparative negligence.

FOURTH DEFENSE

1. At the time and place of the accident, the following statute of the State of Tennessee was in full force and effect.

T.C.A. § 55-8-145. Obedience to signal indicating approach of train—Penalty.—

(a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within fifty feet (50′) but not less than fifteen feet (15′) from the nearest rail of such railroad, and shall not proceed until that driver can do so safely. The foregoing requirements shall apply when:

* * *

(3) A railroad train approaching within one thousand five hundred feet (1500′) of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard; and

(4) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing . . .

2. Eddie Shanklin violated the foregoing statute and the violation was a direct and proximate cause of the accident and resulting fatality.

3. Plaintiff is therefore barred from recovery under the doctrine of comparative negligence.

FIFTH DEFENSE

1. In 1970 Congress enacted the Federal Railway Safety Act which is codified at 45 U.S.C. §§ 421, *et seq.* The Secretary of Transportation in 1971 promulgated regulations under the act governing train speed. All common law duties relating to train speed have therefore been preempted by the Supremacy Clause of the United States Constitution.

2. In 1973 Congress enacted the Highway Safety Act of 1973 which is codified at 23 U.S.C. §§ 130, *et seq.* The Secretary of Transportation has promulgated regulations under the act governing standards for crossing warning protection where federal funds are committed to improve crossing safety.

3. Prior to the accident federal funds had been committed and used to improve crossing warning protection at Oakwood Road. All common law duties relating to crossing warning protection devices have therefore been preempted by the Supremacy Clause of the United States Constitution.

EVERETT B. GIBSON LAW FIRM
950 Morgan Keegan Tower
50 North Front Street
Memphis, Tennessee 38103
(901) 576-8211

By: /s/ Everett B. Gibson
EVERETT B. GIBSON
Attorneys for Defendant
Norfolk Southern Railway Company

[Filed May 7, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

JURY VERDICT

We, the jury, present the following answers to the questions submitted by the Court:

1. Considering all of the fault at 100%, what percentage of the total fault is chargeable to each of the following persons?

Eddie Shanklin	30%	(0-100%)
Norfolk Southern Railway Co.	70%	(0-100%)
	Total	100%

(If you find Eddie Shanklin's fault to be 50% or more, you do not need to answer Question 2.)

2. Without considering the percentage of fault found in Question 1, what total amount of damages, if any, do you find were sustained by the following parties:

Dedra Shanklin	$615,379.00

Date 5/7/96

/s/ [Illegible]
Jury Foreman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

JUDGMENT IN A CIVIL CASE

[×] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that in compliance with the Jury Verdict entered in the above-styled matter on May 7, 1996, judgment is hereby entered in favor of the plaintiff, Dedra Shanklin, against defendant Norfolk Southern Railway Company and damages awarded in the amount of $430,765.30.

IT IS FURTHER ORDERED that in compliance with the consent order dismissing defendants Norfolk Southern Corporation and Cincinnati, New Orleans and Texas Pacific Railway Company entered on March 29, 1995, judgment is hereby entered for the defendants Norfolk Southern Corporation and Cincinnati, New Orleans and Texas Pacific Railway Company.

APPROVED:

/s/ James D. Todd
JAMES D. TODD
United States District Judge

Date 5-8-96

ROBERT R. DI TROLIO
Clerk

This document entered on the docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 5-14-96.

/s/ [Illegible]
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

JURY CHARGE

* * * *

[9] Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this, and you should put it out of your mind.

The plaintiff contends that on October 3, 1993, at approximately 5:15 a.m., while it was still dark, her husband, Eddie Shanklin, was traveling in his automobile east on Oakwood Road in Gibson County, Tennessee, where it intersects the main line of a track used by the defendant, Norfolk Southern Railroad—Railway Company. He approached the Oakwood Road railroad crossing at a reasonable speed of twenty miles per hour when he was struck broadside and killed by one of the defendant's trains.

The train was being operated at a speed of forty miles per hour on a Class IV track, which allows speeds up to sixty miles an hour.

The plaintiff contends that Eddie Shanklin did not slow or react prior to the collision because he did not see or hear the train. The railroad failed to give sufficient visual or audible warning that the train was in [10] hazardous

proximity. The sight distance was obstructed by a house which limited the view of both Mr. Shanklin and the engineer.

The plaintiff contends that Eddie Shanklin was killed because of the following acts of negligence on the part of the defendant, Norfolk Southern Railway Company.

Number one: failure to identify the hazards at the Oakwood Road crossing and to provide adequate warning devices even though they were aware of the hazard.

Number two: failure to sound the horn on the train as it approached the crossing in time to give adequate warning to Eddie Shanklin.

Number three: failure to keep a proper lookout ahead as the train approached the Oakwood Road crossing.

Number four: failure to apply the brakes and reduce the speed of the train in a timely fashion as the train approached the Oakwood Road crossing.

Number five: failure to take reasonable precaution to provide a safe line of sight at the Oakwood Road crossing by removing vegetation and failure to request that vegetation not on the railroad's right-of-way be removed.

Number nine: failure to warn Eddie Shanklin of the proximity of the train by any method reasonably expected to be seen or heard. That was number six rather [11] than nine.

Plaintiff also contends that the defendant railroad violated a Tennessee statute in effect at the time of the collision and that that violation was the proximate cause of Eddie Shanklin's death. That statute is Tennessee Code Annotated 65-12-108, failure to sound the whistle or the bell of a train at a distance of one-quarter of a mile from a crossing.

The defendant contends that at the time of the collision, Norfolk Southern Railway's employees operated the train involved in compliance with all common-law and statutory duties. The headlight of the train was on, emitting a strong light. The engineer of the train sounded the horn at one-quarter of a mile from the crossing and continued to blow the horn until the impact occurred. The train was traveling at a speed of forty miles per hour when the brake was applied, which was within the applicable speed limit. Within 650 feet of the crossing it was impossible for the engineer to slow the train in time to avoid the collision. The train crew was not guilty of any acts of negligence.

The defendant railroad also contends that the Oakwood Road crossing was equipped with three advance warning signs and two reflectorized crossbuck warning devices, which comply with the Uniform Manual on Traffic [12] Control Devices. These warnings were reasonably adequate for the Oakland Road crossing, which is a predominantly rural crossing with no history of personal injuries prior to this accident.

The sole cause of the collision in this case, according to the defendant railroad, was the negligence of Eddie Shanklin. He was familiar with the Oakland Road crossing, as he lived six-tenths of a mile from it and used it at least twice a day each workday, and he would hear the train horn when his automobile was two hundred feet from the crossing and could see the headlight of the train from 135 feet from the crossing. Traveling at a speed of twenty miles per hour, Eddie Shanklin's stopping time was less than sixty feet, giving him sufficient stopping distance to avoid the collision.

The railroad contends that defendant Eddie—that plaintiff Eddie Shanklin failed to comply with his com-

mon-law duty to keep his vehicle under proper control, to devote full time and attention to the operation of his vehicle, to keep a proper lookout ahead and stop his vehicle when he knew or should have known that the train was approaching the crossing.

It's the duty of a railroad company to exercise reasonable care at public highway crossings to warn and to avoid injury to persons traveling upon the highway and [13] crossing the railroad tracks. The amount of caution required by a railroad company in the exercise of reasonable care must be commensurate with the hazards and dangers that are apparent to it or that would be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence.

The tracks of a railroad in themselves are a warning of danger. Before a person drives a vehicle into the space that would be occupied by a train if one were to pass over the tracks, it is his duty to use every reasonable opportunity to look and listen for the approach of a train, an engine or a railroad car upon the tracks and to yield the right-of-way to any approaching train, engine or car so near that it constitutes an immediate hazard. What is included in the term "every reasonable opportunity" depends on all the surrounding circumstances as they would be met and viewed by a person of ordinary prudence in the same position.

No failure of duty or of the customary practices on the part of those in charge of a train or of anyone handling or supervising any phase of its operation absolves a person going along the track area from the duty to use ordinary care for his own protection.

If the view of the tracks is obstructed or if the sense of hearing is impaired, then greater caution is [14] required in approaching them. The motorist is required

to look and see what is there to be seen in the exercise of proper care, taking into account the motorist's familiarity with the crossing. If the obstruction is such that one cannot obtain, without stopping, a reasonably assuring view of the tracks in both directions before entering the dangerous track area, then it is his duty to look and listen for the approach of a train, train engine or railroad car and stop, if necessary, and not proceed onto the dangerous track area without taking the precautions that a reasonably prudent person would take under the same circumstances.

Where a person apparently in full possession of his faculties and capable of judging the danger of his position is seen approaching a railroad track, the operator of a train may presume that he will observe a proper degree of care for his own safety and stop before getting upon the track.

The speed limit for the train at the crossing at issue in this case was sixty miles per hour, and the speed limit for the automobile was fifty-five miles per hour.

The failure of any engine driver to blow the whistle or ring the bell at any public crossing so designated by either the railroad company or the public officials shall constitute negligence.

[15] In order to prevent accidents upon railroads, the following precautions shall be observed. On approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one-fourth of a mile from the crossing and at short intervals until the train has passed the crossing. Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal or other obstruction

appears on the road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident.

A statute which requires that the engine bell be rung or the whistle blown when a train approaches a crossing, but which does not require a flagman or automatic signal there, is not intended to furnish a standard by which to determine whether or not in every case the railroad has discharged its duty in respect to giving warning of the approach of a train, but is intended, rather, to prescribe the minimum of care which must be observed in all cases.

In order to prevent accidents upon railroads, the following precautions shall be observed. I've already read you the statute requiring the bell or whistle to be blown a fourth of a mile prior to the crossing.

[16] An exception to the general rule is one in which the conditions of the crossing create an ultrahazardous situation. An ultrahazardous situation or a trap exists where the conditions at a railroad crossing are such that the railroad employees knew or should have known that a motorist might not be able to see the railroad in time to avoid the collision.

To fulfill the duty to give timely warning, the train company must take such actions that safety and common prudence dictate. Reasonable care and common prudence may encompass providing additional warning devices if the crossing is more than ordinarily hazardous.

The mere fact that a railroad has complied with statutory requirements does not fulfill the entirety of the railroad's duty to a driving public where an extra hazardous crossing is involved. Common-law negligence can exist even where the railroad has met the statutory requirements.

All persons or corporations owning or operating a railroad in this state are required to make and furnish good and sufficient crossings on the public highways crossed by them and to keep such crossings in lawful repair at their own expense. Irrespective of a state or local government's authority to place safety devices at a grade crossing, this allocation of authority does not relieve the [17] railroads of their duty to take all reasonable precautions to maintain grade crossing safety.

When a train and a vehicle arrive at a crossing at the same time, the train generally has the right-of-way; however, the privilege to exercise the right-of-way by the train is accompanied and conditioned upon the train giving a due and timely warning.

In deciding this case you must determine the fault, if any, of each of the participants. A participant is a person, corporation or other entity who participated in the events leading up to this action. If you find that more than one of these participants are at fault, then you will compare the fault of the participants. To do this, you will need to know the definition of fault. A participant is at fault if you find by a preponderance of the evidence that the participant was negligent and that the negligence was a proximate cause of the injury or damage for which a claim is made.

Fault, insofar as a negligence claim is concerned, has two parts: negligence and proximate cause. Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do or the failure to do something that a reasonably careful person would do under circumstances similar to those shown by the evidence. * * *

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF BERNARD ABRAMS

* * * *

[113] FURTHER DIRECT EXAMINATION

BY MS. O'DWYER:

Q Dr. Abrams, let me ask you, sir, if you have visited at our request the crossing at Oakwood/Church Road where Eddie Shanklin was killed October 3rd, 1993?

A Yes, I have.

Q And did you—upon visiting that crossing and after review of various scientific documents and also deposition testimony and so forth, did you formulate an opinion as to the cause of the—of Mr. Shanklin being hit by the train?

A Yes, ma'am.

Q And what was that opinion?

[114] A Basically my opinion was the failure to give warning to an approaching driver that a train was about to be there which is given by various signalizations or other terms to tell the driver in the existing signalizations such as a locomotive light would not have been sufficient to foliage, blockage by a house. It by its very nature was 75 years old in concept that, therefore, Mr. Shanklin was not prepared for seeing—visually seeing a train by the information he was receiving as he approached the crossing.

Q You mentioned by its very nature 75 years old. What was it that you're speaking of?

A When referring this point to the locomotive light, the conceptual idea of the locomotive light was to place it high 75 years ago so that they wouldn't run into animals or things on the tracks. It's basically for the benefit of the locomotive engineer for the safety of the train sequence on the tracks. But automobiles were unheard of 75 years ago practically.

Q Did you rely on the Code of Federal Regulations' definition of what that light is required to do in order to support your opinion?

A Yes, ma'am.

[115] Q What is the actual minimum light required to do?

A The Code of Federal Regulations gives specific quantitative amounts to the railroad light and basically says it has a minimum candela of 200,000, and it must permit the engineer to see an object down the track at 800 feet. And that is a minimum statement. In reality they're about 250,000, and most trains have two of them. And they're about 14 feet, 10 inches high, but they're a very unusual design. They're a very narrow focus.

For those of us who go fishing, I take my flashlight, and I have two beams, one very narrow beam that lets me see something right down the line and one sort of a wide beam that diffuses and scatters light. The railroad's light on the locomotive by design is very narrow, and as soon as you're five degrees off the axis so ever slight, it drops an intensity to almost 80 to 90 percent. Maybe I could show you this on a drawing.

Q I wanted you first to do one other thing to represent what you've just said. Yet me show you what's been marked as Plaintiff's Exhibit No. 19 which I would like

to offer into evidence. And I have shown it to Mr. Gibson.

* * * *

[117] Q Among that research is there—is one of those treatises or reports from the one that you have actually gone out and done testing and verified yourself?

A One, I believe, you're referring to is one written in 1971 sponsored by the department of transportation, and its written by a Mr. Aurelius, and he researched the various aspects of the existing—

MR. GIBSON: Objection to hearsay, Your Honor.

THE COURT: Yes, sir. Ask this witness his opinion without asking him to repeat the hearsay on which you based that opinion.

Q (By Ms. O'Dwyer) Did you rely on that report to formulate your opinion, and, if so, what is your opinion as to the railroad's responsibility for providing this?

A I relied on it, verified it. Maybe I'm not answering the question or understanding improperly. It's the railroad's responsibility to provide good light as specified.

Q What did you formulate as an opinion about [118] their provision of a warning if they rely on only the light that is the minimum standard in the Code of Federal Regulations?

A The existing light through the Code of Federal Regulations in my opinion within reasonable scientific certainty is an inadequate warning device for a driver of a vehicle approaching a rail highway crossing.

Q Did you observe at the Oakwood crossing any other factors—let me take your board down for just a minute in case you want to look at Mr. Burnham's example here—that also contributed to any opinion you might have as to the fault of the railroad in not providing adequate warning?

A Basically the train if its light is 14 feet, 10 inches high was traveling in this manner, when you look at it from the side viewpoint, it looks like an ordinary street light. There were street lights in the background on U.S. 42 that appeared—

Q Dr. Abrams, you'll have to speak up. You can stand down, but you need to speak up.

A Okay. I'll try and get my voice up, and I do apologize for that. Basically we have the train moving in the general direction, and there's a house blocking right about here. There's sight line [119] blockages all the way through here. There's a vertical rise that the car must come up, and the railroad light is not only 14 feet, 10 inches high. It's approximately 20 feet higher than the driver.

In the background is U.S. 45, I believe, east. And there are luminaires known as street lights along that road. When you look at them together, they all have an equivalent type of look because the side of a railroad ight is not as bright as when you look straight into it.

Q Is there anything at this crossing that obstructs the view of the light even if it had been in your opinion adequate?

A. Basically the answer is yes, probably because of its location. These are all trees, foliage. However, also as one comes up the drive, there is a house right at this point here. There is a ditch here and sort of an embankment in this area.

Q How do you refer to that triangle that's created by the blue line in regard to when the driver finds himself there?

A This is what's commonly termed as a sight triangle, S-I-G-H-T, and basically refers to the plot of land and whatever obstructions may be within it. Those are physical, but at nighttime we have [120] additional obstruction called darkness.

Q Go ahead. I'm going to let you stand up. I know you prefer to stand up. In this particular picture I want you to tell us about what your opinion is as to the usefulness of what you see on the front there that's being flashed at by the camera.

A What we have here is the railroads and signals. It's much brighter than it is because this is taken with a flashbulb. It's a white paint that's on the front that is reflectorized but not retro-reflectorized. Because the railroad lights are high, they do not light up. It has no protective mechanism or help as far as vision is concerned.

Q Was that addressed in the Aurelius report as far as conspicuity?

A He addressed the fact in his opinion. I certainly agree with it that the consistency of this type of a—

MR. GIBSON: Whose opinion?

THE WITNESS: I am giving my own opinion.

MS. O'DWYER: He's giving his own opinion.

THE COURT: I'm having a hard time [121] hearing.

THE WITNESS: I'm sorry. I'll get my voice up, sir.

THE COURT: When lawyers get witnesses down off the witness stand, it makes it difficult to hear. The government spends hundreds of thousands of dollars getting us microphones.

A I'm sorry. I'm a gentle soul, and I speak gently. Basically what we have here is lack of contrast. It's hard to see a black object on a black background, so that means low conspicuity which in plain words means hard to see. The white emblem is the emblem that this particular railroad places on their engine. What the sum total of all this means is that it doesn't help an approaching driver see a train or locomotive rather. Is that better?

Q (By Ms. O'Dwyer) That's fine. Why don't you pick up your chalkboard, Dr. Abrams, and illustrate for us your opinions in regard to—that support your opinion

that Eddie Shanklin was not given adequate visual warning by the headlight.

A If one takes—

THE WITNESS: Can you hear me, sir?

THE COURT: Yes, sir.

[122] A To look directly into the light like one looks into a flashlight, it would have a very intense light, just a complete circle with flare. You would have discomfort and disability, but that isn't the way we approach a railroad crossing. These are the tracks, and this is the road. What basically happens, we look at it from the side by design. It's in this manner.

However, it's like turning a flashlight. It becomes very dim unless it's right at you. If you look at it from the side, you see a very pale light that gets paler and paler as it extends out. It has a yellowish cast. I'm not being technical, but all colors have what's known as a color specification. And the electromagnetic spectrum red is 700. Blue is 400, or if you buy what they call blue blockers—those are the red glasses, and they block out the blue at the other end.

Well, what we have is the fact that because of the filament and the design of the railroad light, it has a yellowish appearance that appears as a point source of the distance and is very similar to the commonly used yellowish luminaire or street light, and it's hard to distinguish. So if one were to have the small light coming from here and coupled here from a [123] distance they would have very similar to identical appearance.

Q (By Ms. O'Dwyer) If you could, get back by the mike there and sit down for just a minute. In formulating your opinion did you review the testimony of the train crew who was driving the train that struck Mr. Shanklin?

A Yes, ma'am.

MS. O'DWYER: Your Honor, for the purposes of this witness I'm going to offer in the three train crew statements rather than anything from the depositions with the approval of Mr. Gibson. These are Exhibits 24, 25, and 26.

THE COURT: Any objection, Mr. Gibson?

MR. GIBSON: No objection, Your Honor.

THE COURT: Mark those.

Q (By Ms. O'Dwyer) These statements, let me set these up here so we can see what we're talking about. Did you attach any significance to the train crew's statement, or three statements actually, to the fact that the train crew did not see Eddie Shanklin who was traveling at, according to those statements, at 20 miles an hour and that he did not [124] slow or react?

A There are two factors to it. One is it reinforces the fact that there was a sight blockage there of foliage. Mr. Shanklin didn't see them. They obviously didn't see him. They go hand in hand. The other aspect is that if they could only see him at this short distance, he obviously could only see them because a light is up above, so it was a no win situation for Mr. Shanklin.

Q How would you describe the position he found himself in?

A I would have to say this. He was trapped in the fullest sense of the word being trapped. He had already committed to go up and over the vertical rise. He didn't have any other reason not to. And then suddenly he was up on the track with the impact, and he was trapped with no method of getting out of the trap, I guess, is the only way to say it.

Q What is the purpose—from the aspect of warning, what should the warning do?

A Any type of a warning should tell the person driving a vehicle what's about to occur in front of them.

Q Does the crossbuck tell anything to the driver as to what's about to happen?

[125] A The crossbuck by definition is classified as passive. In other words, it doesn't tell the driver a train is there. It doesn't tell them a train is about to be there. It merely says somewhere in space out here there's a rail highway crossing.

Q What about the advanced warning sign, the railroad yellow sign? Does that provide anymore information to the driver that a train is coming?

A That's a redundancy in the sense that it tells, in fact, there is a crossing out there, but it still doesn't locate it. It doesn't tell you a train is coming or a train may be occupying a crossing.

Q How does in this situation—at the crossing where Mr. Shanklin was hit, how does the obstruction view affect the amount of time that Mr. Shanklin had to react to whatever information he would have got?

A As we pointed out before in the sight drawing the entire right sight triangle was blocked, so as he approached the crossing the time that he had to note that a train was about to be there was shortened an enormous amount of time to the point that he couldn't react and prevent, save, his own life.

Q Have you participated in the studies involving how much warning should be given to a driver of a rail grade highway crossing?

* * * *

[127] article, and, if you would, tell us about that article and how you made a determination as to what would be an adequate warning for a motorist at a crossing?

A We wrote the article. It was a whole chapter, in fact. We use it for teaching, but it's about the difference between the two types of crossings. One is a passive where no time frame is given, no location, all decisions of the driver. Then we looked at those that have signali-

zation of flashing lights or gates that somewhere say, hey, Mr. Driver, up ahead of you a train is about to enter or is on the crossing. In those areas the time frame is considered 20 seconds necessary so the driver can get prepared to stop at a crossing. So when one sees a flashing light, they come on approximately 20 seconds before you would arrive at the scene.

Q How if you did use the driver's perception reaction time and braking time in making that—formulating that opinion?

MR. GIBSON: Your Honor, excuse me. Is the opinion the witness just stated have to do with flashing lights and gates? If so, I believe it's irrelevant.

THE COURT: Restate the question so [128] the witness understands what you're asking.

Q (By Ms. O'Dwyer) The 20-second rule that you just pronounced as your opinion as to what would be—the article that you wrote about inadequate warning, does that apply also to crossbuck crossings, passive crossings, that they should have that or more warning, less warning?

A I understand better. The answer is my opinion within a reasonable scientific and visual certainty, yes, the 20 seconds is needed to send the information to the brain to the visual pathway to create the ability to stop in time at a crossing.

Q And how does the perception reaction time of a driver figure into the analysis that any particular time, the 20 seconds or anytime, is needed?

A It refers that there's not enough time necessary, first, to detect something, whatever it may be to identify it as perhaps a danger, to recognize that you must do something about it, then to react by accepting a message to the brain, and then you must do what's known as a maneuver, take your foot off the gas, put it on the brake.

All of this takes time. If it's an unexpected event that you've never seen before, it can add confusion and, again, lengthen the time. All of this elongates into [129] a considerable amount of seconds.

Q What number of seconds is the reaction time?

A The perception reaction time by Ashtoe is 2.5 seconds. That refers to sort of a medium. It could be more or slightly less, but at nighttime it's more. And then you have to add in the bits of information that you have. For example, in this case the driver was going down a dark two-lane road. He had to be careful. He had an incline. That's a second bit of information. He had the rondel (phonetic). That's a third piece of information. The mind can be overloaded. Then when you have an unexpected event, it shoots up the reaction time and lengthens it considerably.

Q Did you—did part of your opinion rest on the fact as to whether or not this train was a scheduled or unscheduled train?

A Yes, ma'am.

Q Which is it?

A This is an unscheduled train as I understand it.

Q Did you formulate as part of your opinion what, if anything, the railroad should have done that they failed to do at this crossing? And, again, be cautious. * * *

* * * *

[133] CROSS-EXAMINATION

BY MR. GIBSON:

Q Dr. Abrams, am I to understand that you're telling this jury that in your professional opinion a person approaching a crossing like this protected only by cross-

bucks should have 20 seconds advanced notice before a train reaches that crossing?

A That would be the recommended—yes, sir.

Q That's your recommendation?

A Yes, sir.

Q And, as you know, this vehicle was traveling at 20 miles an hour. You recall that from your investigation?

A Yes, sir.

Q Which you will agree is approximately 30 feet per second.

A Yes, sir.

Q So 20 seconds would be a length of 600 feet, right?

A Yes, sir.

Q Two football fields?

A Yes, sir.

Q So in your professional opinion in order to [134] give a motorist adequate warning that's proceeding 20 miles an hour down a road at night towards a crossing with just crossbucks, you've got to let that motorist know there's a train coming two football fields before the motorist gets to the crossing; is that it?

A No, sir.

Q Well, what did I miss?

A You missed the speed that's permitted on the road.

Q Well, we're talking about this lawsuit.

A On this road.

Q This motorist didn't need any 20 seconds advanced warning going only 20 miles an hour; did he?

A Generally you are right, sir.

Q You refer to the Code of Federal Regulation requirement of brightness of a railroad headlight, and I believe you said that the code provides that it must be at least 200,000 candelas; is that right?

A Candela.

Q Is that the same thing as candlepower?

A Well, there's a—without getting into too much physics, it's a general statement, and it's the total amount of light emitted from a source.

Q But it's a reasonable proxy for the term candlepower?

[135] A I would have to agree with you, yes, sir.

Q Dr. Abrams, you as a motorist, have you ever approached a yield sign? Do you have those up in Ohio, an inverted triangle with the word "yield" on it?

A Yes, sir.

Q And if you approach a yield sign and you're a driver, do you put your foot on the brake or have it positioned to go on the brake quickly if needed?

A I think that's one of the elastic situations depending upon the visual footage being given as you approach that crossing.

Q I'm not talking about the crossing.

A Or that intersection or whatever the yield is there for.

Q Isn't it a common practice for you to get your foot situated where you can reach the brake quickly as you go through that—

A Not always, no, sir.

Q But this railroad crossbuck is the equivalent of a yield sign; isn't it?

A Not in my opinion, sir.

Q Isn't it true that a motorist under law is required to yield to the approaching train when a train is approaching a crossing with a crossbuck [136] present?

THE WITNESS: Am I in the area of law, Your Honor?

THE COURT: Hold on a minute.

MS. O'DWYER: He asked him a question, Your Honor. He ought to be allowed to answer it.

THE COURT: He's asked him the question, and you need to answer the lawyer's questions until you hear one of them say objection, and you'll hear them soon enough.

THE WITNESS: I don't want to do anything wrong.

THE COURT: Answer them until you hear one lawyer say object, and then we'll stop, and then I'll rule on the objection.

THE WITNESS: Thank you, sir. If it says don't walk on the grass, I don't walk on the grass. That's all there is to it.

THE COURT: I'm with you on that.

A The yield is only if something is visibly and discernibly there. Otherwise you do not yield.

Q (By Mr. Gibson) But the point is, you have to be prepared for that event in case it happens; don't you, Doctor?

[137] A The point I'm making, sir, is visually you have to be prepared. If you're not visually prepared, the answer is no, sir.

MR. GIBSON: I have no further questions.

THE COURT: Anything else, Ms. O'Dwyer?

MS. O'DWYER: Nothing further, Your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you for your patience.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF ARCHIE BURNHAM

* * * *

[7] Q During that time or after retiring from the Georgia DOT, did you participate in the preparation of the manual on uniform traffic control devices?

A Yes. Throughout my career in government I worked on the national level in helping form the standards and policies that are active in the railroad crossing areas. There is a committee called the National Committee on Uniform Traffic Control Devices that formulate the specific design criteria and the warrants for application of all of these devices, signs, signals, and markings.

I served for a period as chairman of the section part 8, they call it, that deals with the rail highway grade crossing exclusively. There's a portion of that manual that contains all these regulations and standards, and I was the chairman of the group when that material was brought into the manual and published. After that time I became the vice chair of the entire national committee, and I held that position until I retired from government in 1988.

* * * *

[89] Q (By Ms. O'Dwyer) Is this something new to the industry?

A No, ma'am. The sight distance triangle may have been published in the first edition in 1976. I have to confess that I was one of the coauthors of that, and I can't recall readily whether that drawing was in there or not.

It was in the second edition published in 1986. But it's not new. It's something that's recognized in the industry as a means of evaluating various speeds of approach to both trains and cars to see what's necessary to give the motorists an opportunity to stop. You can't stop the train. You have got to be sure that the motorist has enough information so that he can stop the vehicle, and that's the purpose of that chart.

Q At this particular crossing where the motorist does not have adequate sight line, does that affect in any way his ability to see or hear the train with any warning that they might give?

A Yeah. Obviously, that's a restrictor. The only way to get the information to the motorist that the train is coming at a passive crossing that only has a crossbuck is by what the motorist is given to see or his ability to hear. It's this kind of condition with this kind of restriction that makes it [90] very tough. In fact, it makes it impossible. I call it a trap because the information is received too late after the motorist is gone past which is called the point of no return or the non-recovery error. At that point if he gets the information, it's too late. When he starts to try to stop, he will ultimately end up in front of the train.

Q Where on your chart is that point of no return?

A Well, for 20 miles an hour it starts at this 135 foot point that's listed right here on the highway. In other words, any motorist that passes that point faster than 20 miles an hour is not going to have a chance to receive any kind of information. If he had availability back this far but with this actual condition when he has only the sight available to this point, he doesn't have a chance. Once he's sighted the train, it's too late. He's going to get hit.

(Counsel reviews documents.)

A While we're on that point I've done a detail analysis of this sight distance relationship—

THE COURT: Let's wait until the lawyers are back with you because there's always a likelihood for both or one of them to object to [91] something.

Q (By Ms. O'Dwyer) I want to be able to hand you these photographs so that you could give the jury an idea about the engineer's view and how this restriction to the crossing affects his ability to see the driver.

A Yes. All of these photographs are from the locomotive engineer's view. And they are taken in different positions as he comes down this rail, and you can see it is equally restricted. The motorist can't see the train. The engineer itself can't see the motorist. You'll see from those photographs this engineer is actually coming down through a tunnel where the roadbed on both sides of the track is even higher than the track bed. So he's coming through a tunnel and looking down here, and his obstruction is restricted from this way for the same reason that the motorist obstruction exists this way, and that's what those photographs are.

Q Just for the moment so that we can be a little more detailed, let the jury take a moment to see these. Exhibit No. 9, engineer's view from 550 feet, can you tell the jury how many seconds that would be to the point of Mr. Shanklin's death?

A The train is traveling 40 miles an hour.

[92] MS. O'DWYER: May I pass these to the—offer them for admission into the record?

THE COURT: We'll send all the exhibits back to the jury at the end of the trial. That keeps from turning a one-week trial into a three-week trial.

MS. O'DWYER: Very well, Your Honor.

A The answer to the question is 8.3 seconds. The train is traveling 40 miles an hour which is roughly 60 feet per second divided into 500 feet is 8.3 seconds. So

that's how long it would take to get from this point on to the point of impact there at the crossing.

Q (By Ms. O'Dwyer) And this photograph at 225 feet can you tell how far back—how many seconds back from Mr. Shanklin's death this would have been taken? And this is the foldout that does not have an exhibit sticker on it, and we'll have to mark it.

A The train is 3.75 seconds from impact at that point, 225. That point would be just before it comes into view under the 74. So the train is only 3.75 seconds away at the 225 that the photograph was made.

MS. O'DWYER: For the record, Your Honor, for the sake of time, we had marked the one [93] that was not hooked together, so we'll put this as the next consecutive number which would be 16.

Q (By Ms. O'Dwyer) Mr. Burnham, if you could, take a look at the next picture in front of you there, and display that for the jury. Tell us, sir, what that represents as far as—because I think we're losing sight of the fact that this was at night. What does that represent what Mr. Shanklin would have seen each evening or morning as he was going across the crossing?

A This is a very important picture because it indicates as the motorist is traveling eastbound direction, it looks into this quadrant. On any trip in the hours of darkness he's already going to see two street luminaires off in the distance here. But you lose your perspective as you approach on this road to know where those luminaires are. And it can be confusing when an additional source, head lamp of a train, would come into view whether you're looking at the same old luminaires you've seen before or whether there's another one that's come into the picture.

MS. O'DWYER: For the record we'll offer that as Plaintiff's Exhibit No. 17.

Q (By Ms. O'Dwyer) Mr. Burnham, tell us what [94] other information you relied on to substantiate your opinion as to whether or not the appropriate warning was given by either sight or sound to Mr. Shanklin?

A Well, there's several other sight references that I used. I have two short videos that would indicate the perspective of this drawing and show you factually what existed at the scene if I could be allowed to show it.

Q We'll have to wait to get to those.

A I have two here now.

Q Well, let's go ahead and do that. While I move this up—

THE COURT: Mr. Gibson, if you need to resituate yourself, you may do so.

MR. GIBSON: May my client situate with me?

THE COURT: Yes. At the end of the jury box might be a good place.

A This is a very short video showing that critical quadrant and how fast the train goes through it. This also shows you the amount of greenery, the trees and limbs you have to look under.

Q (By Ms. O'Dwyer) Is that about to run again?

A Yes.

MS. O'DWYER: Your Honor, I would [95] like to offer Mr. Burnham a clock so he can begin that when we get to the twelve and tell us how many seconds the last seconds of Mr. Shanklin's life this represents.

A It started at one after and went to about four seconds. And that's the point of this. It's a very quick situation. The train just comes into view, and then it's gone. And the things I want to also point out here are these trees that I had represented on the drawing. This is what they look like in a real life situation. You get a very quick glimpse of them, but you can see that. The one I want to show you which is a little bit longer deals with

the computer simulation. I've examined in some depth the time distance relationships with respect to where the train was at the time where Mr. Shanklin was. This is a computer simulation that shows you that. It just takes a second to run. There are a couple of things I'd like to—I may have to rewind this. I'm not sure.

Q (By Ms. O'Dwyer) I think so.

(Playing videotape.)

A This represents the train approaching at its speed of 40 miles an hour and the vehicle approaching at 20 miles per hour. This simulation is set up to [96] evaluate —that's what all these numbers are over here—at any given point in time 500th's of a second to be able to see where each vehicle is in relation to the other.

The reason that's important is because while we had a restricted sight distance of only 174 feet it's even a worse story than that because the train didn't even get to the 174 foot point because Mr. Shanklin was 94 feet from the rail. So he literally had three seconds of time from when the train came into view before the collision, and it takes 3.4 seconds for a motorist to be able to react and brake under those conditions. And that's what this simulation documents, and we have a computer printout that has all that listed down there. I just wanted you to see the video that shows how it was put together and how it was analyzed. That's another one of the things that we would rely on and advising you our opinion that this is a duly ultrahazardous crossing due to a sight restriction.

Q (By Ms. O'Dwyer) You mentioned to the jury something called the braking time. How does an expert in your field or engineer arrive at the appropriate braking time for a situation like Mr. Shanklin found himself in?

[97] A To stop a vehicle obviously you would have to brake it, and that means you would have to apply the

brake petal and stop the vehicle for whatever speed you're traveling. It takes a various amount of distance depending on what your speed is. At 20 miles an hour the calculation I made was allowing a 1.5 seconds of reaction time which is even better than the design reaction time of two and a half seconds. And then I added the amount of distance to brake the vehicle and added the 15 feet to keep him braking so he did not get on the rail. In other words, stop at 15 feet short of the rail. That took 94 feet. That happens to be at the point that Mr. Shanklin would be when the train comes into view at the 170 foot point.

Q Do you know, sir, whether trains are wider than the rail?

A Yes. They overhang about 30 inches on either side of the rail. That's why you establish a zone of 15 feet from the rail called the hazard area. The goal is to keep vehicles out of the area of the train.

Q Tell me again about the reaction time. You said there was the 2.5 reaction time that is the design time. What do you mean by "design time"?

[98] A Well, the standards in the literature currently call for two and a half seconds. There's a lot of research going on to say it should be increased even more than that because there's a lot of older drivers in the driving population now. But currently it's two and a half seconds.

There are some occasions where people with extremely good reflexes and so forth can do better than that and I presume the best case situation as far as that went to try to get a good reaction time. I don't think it's realistic to take it any lower than that because you have to appreciate this as an unexpected event. And whenever you violate the driver's expectancy, it takes more time for them to recover what's been violated.

And in particular any railroad crossing where you have multiple repeat trips by familiar drivers, they become so

accustomed to the fact that they passed that point last time and successfully went across because there was no train, they think that that becomes the pattern, that it can happen every time. So if the train is coming, it's a very unexpected event, and it will take them longer to react to put into action some evasive movement. That's why I used the number of one and a half presuming the best case [99] situation Mr. Shanklin might have had great reflexes and super sharp, but at the same time he was caught in a situation where it would not be possible for him to stop under the conditions of the time distance relationship he faced.

Q You've spoken several times in that analysis about the literature. Tell us, if you would, is that literature available at the railroad?

A Yes, it—

MR. GIBSON: Objection, Your Honor. She's going into something you've already ruled on.

MS. O'DWYER: Now, just a minute.

THE COURT: Let's talk about it.

(The following proceedings were had at the bench by Court and counsel out of the hearing of the jury:)

MS. O'DWYER: I just want to offer these for evidence, Your Honor. Of course, we had to try to take this signal—

MR. GIBSON: All of these paragraphs were taken after the signals were installed. Before the trial began today I agreed with Ms. O'Dwyer that she could use that one because she did a pretty good job of hiding it; although, a

[101] MS. O'DWYER: That one is good; isn't it?

THE COURT: I think that one is okay. If you turn it a certain way, they may can see that there's something wrong with it, but they may think it's just a smudge. I don't think they'll see that one.

MS. O'DWYER: Thank you, Your Honor.

THE COURT: Anything else?

MR. GIBSON: Well, I would like to reserve an objection to number—Plaintiff's 12 and Plaintiff's 15.

THE COURT: Let me see. Okay. Your objection is to 12 and 15; noted.

(Thereupon, the following proceedings continued within the hearing of the jury.)

Q (By Ms. O'Dwyer) What did you rely on to formulate an opinion that in addition to not having adequate sight distance that Mr. Shanklin was not given an adequate warning by either horn or light? And start, if you would, with horn so we can divide them up.

A Well, I evaluated the capability of being [102] able to hear the horn on this particular crossing. The law of physics tell us that the horn will degrade at the inverse function of the distance that the source is away from the point. That sounded too long. Let me break it down.

If you emit a sound, any sound, whatever level that's on, then 100 feet away it's going to come down a certain unit, and 200 feet it comes down twice that. And 400 feet it comes down a third time and so forth down the line. The standard horn on a locomotive puts out 96 decibels 100 feet in front of the engine. So 200 feet in front of the engine it's only emitting—it's only projecting 90 decibels. 400 feet it's down to 84. 800 feet its down to 78 and so forth.

And when you understand that the sound is diminishing as a function of distance, you realize it becomes very critical whether that horn has sounded in proximity to the crossing because obviously the closer it is the louder it's going to be. And the further away it is it gets to a certain point where it's not effective. It can't be heard.

We examined the noise levels in the vicinity of the crossing, and we found it to be relatively quiet, around 58 decibels, I believe. We've got a chart on [103] that.

And we found the noise level inside the vehicle when it was moving, and we took an exemplary vehicle like the '76 Monte Carlo like Mr. Shanklin was driving, and we found that we could measure inside the vehicle a decibel level of 80 to 82 decibels. Where there's no activity at that crossing the decibel level was 78. Inside the vehicle was 80 to 82. And, of course, the train 200 feet away it's going to be 90.

Now, the significance of that is to hear anything you've got to have a decibel level, a noise of about nine decibel levels higher than what your environment is. So here we have a vehicle that's 80 to 82. It could only hear something that's 89 to 91 decibels which happens to be right about the breaking point of what the train would be producing if it was sounding the horn when it's 200 feet away. We don't know for sure it did that.

We do know that there's testimony that the horn was sounded, but the horn was sounded from a quarter of a mile away on into the crossing on a fixed pattern, too longs, a short, and a long. Well, between those patterns there's a gap of nothing being sounded. And, of course, whenever that last blast is sounded, there's a gap from there on. So if the [104] train is more than 200 feet away when the last blast of the horn is sounded, it doesn't have the numbers that could penetrate a noise level for someone inside a closed vehicle, that is, a 1976 Monte Carlo approaching the crossing.

We acknowledged that the horn was sounding because there are witnesses, a train crew, someone driving down parallel to the train that heard the horn. And we know where the horn was sounded according to the testimony and followed a certain pattern. But we don't know that it was still going when it was 200 feet from the point of impact. And when it was 200 feet from the impact is only when it would be loud enough that it could be heard by someone inside the vehicle.

And, of course, as you had me calculate a minute ago 200 feet away from the point of impact is just a matter of three or four seconds, a very short period of time, so very possibly sight and sound of the approaching train could have been received by Shanklin at the same point in time. And as I've demonstrated earlier that point in time, 94 feet away from the rail, is just too late. You're in a non-recovery predicament.

Q On what did you rely for your determination [105] that the horn is required to be 100 decibels—I'm sorry, 98 decibels 100 feet in advance?

MR. GIBSON: 96.

Q (By Ms. O'Dwyer) I'm sorry, 96 decibels 100 feet directly in front of the train?

A That's the standard of the industrial. It's printed in the federal laws that dictate the operation of railroads what the requirements are.

Q And is there a—do experts in your field generally rely on such items as the federal register where these things are printed initially?

A The federal register is where the laws are printed and made available to the public, yes. I've read it from that source.

Q Do you rely on FRA reports and studies?

MR. GIBSON: Your Honor, she's leading the witness.

Q (By Ms. O'Dwyer) I'm trying not to get you to tell what you use, but tell me what you rely on that is provided to you from other experts that help you to know that this was how loud it is and whether it can be heard or not.

A I've reviewed the literature that's been published on this subject, a number of different authors, some of which I personally know that have [106] done work in this area. I've discussed the subject with them. It's all consistent with what I'm telling you in the Aurelius.

Q What was the year that the Aurelius report was first published?

A 1971.

Q What about Hopkins and Newfell?

A About '75 as I recall.

Q Have there been any statements by the Federal Railroad Administration that are published as to whether or not the horn is a sufficient primary warning?

A Yes. This has been a most discussed issue. The National Transportation Safety Board of 1990 issued a finding or recommendation—

MR. GIBSON: Objection, Your Honor, hearsay.

THE COURT: Yes, sir. He can use that as a part of his opinion without telling us what that result was. Sustained. That is hearsay.

MS. O'DWYER: He's allowed to tell you what he relied on about the report. I'm not sure I understand.

THE COURT: To the extent that it affected his opinion, he can give the opinion, his [107] opinion. But he does not need to tell us what the survey or the results of the study were because that is hearsay.

MS. O'DWYER: He can tell us the source of the study?

THE COURT: Yes, he can.

A The source of the study was mentioned in the National Transportation Safety Board. They had recommendations about this subject.

MR. GIBSON: Object.

THE COURT: He didn't say it.

A And I took them into consideration in making this opinion that I'm offering today.

Q (By Ms. O'Dwyer) Did you consider in your opinion any department of transportation or code of federal regulations that affect whether or not the railroad is allowed to make the horn any louder and the reasons that they're not allowed to make the horn louder?

A I am familiar with the American Association of Railroads, the regulations to the railroad industry recommending that they keep the standard and—

MR. GIBSON: Objection, Your Honor, hearsay.

[108] THE COURT: Yes, sir, that may be hearsay, but I don't think that's being offered to prove the truth of the matter, only that that's what he relied upon in forming his opinion.

THE WITNESS: It's just another source.

THE COURT: Yes, sir. I'm ruling in your favor. He can answer that question.

THE WITNESS: Thank you, sir.

A It's just a source that I have reviewed and taken the position that I do in this matter on sound that comes from that source of the railroad industry itself.

Q (By Ms. O'Dwyer) You talked about the—now, the manual on uniform traffic control device, can you tell us—I think you told us. Can you tell me how that is connected with the work of the FRA, the AAR, or any of the other regulatory bodies?

A Certainly. The national committee that I mentioned sponsored by a number of agents is who appoint members to the committee that are advisors to the committee appointed by the Federal Highway—excuse me, the department of transportation. They have representatives from the Federal Rail Administration and the Federal Highway Administration [109] that kind of sit in on the deliberations and add in their two cents worth.

The actual deliberations on what material is going to go into the manual, such as part 8 dealing with the rail crossings comes from a group of people who 50 percent are from the discipline of the highway environment and 50 percent from the discipline of the rail environment. And they come together and discuss the specific issues about the material in the manual, things that become known in the industry with respect to the principles that

are used to promote safety at rail crossings. And this participation by members from those two communities assure that the end result comes back to those that have the joint responsibility, the highway and the rail authorities, and that they have a voice in making the rules to regulations as well as a voice in caring about them.

Q Now, within those—without saying that it is a standard or that any law requires it of the railroad, is there a suggested warning time?

A Yes.

Q Does that apply to both passive crossings like Mr. Shanklin encountered?

A Well, there's a principle involved in that, and there's an accomplishment of safety that's called [110] the 20-second rule. And the intent is that—

MR. GIBSON: Your Honor, I have an objection to this witness talking about the intent of a rule. He can say what the rule is if it's otherwise admissible, but to go beyond that and say what the intent is is speculation.

THE COURT: Well, it's hard to know what the intent of something is created by a committee or a group. But you can tell us what the rule is and tell us what the effect of the rule is, what it does or doesn't do.

A Basically to give 20 seconds' opportunity for the motorist to understand that the train is coming. If you can't see it or hear it, that's done through a mechanical means like bells, lights, or gates or flagging. If you can see it or hear it, then the idea is going to have adequate time for that to be absorbed and to make a decision. That's why the horn, for example, is sounded a quarter of a mile from the crossing because under most operated speeds that gives a sufficient times of 20 seconds before the train arrives.

Q (By Ms. O'Dwyer) Let me just ask you, sir, to be on the safe side so we can keep the record correct, I

believe you did refer to the—you held [111] your dB readings, and I'm going to put an example of that and offer it as Exhibit 34.

MR. GIBSON: Let me see that. I still object to that, but you ruled against it. That's Plaintiff's Exhibit 34. I object to that, and I also object to 35. And I don't know whether you ruled on this one or not. I haven't seen that before. What is that?

MR. O'DWYER: I thought he spoke from it, but I noticed I had it in my hand, so let me let you go back and take a look at that one.

A I explained to the jury earlier that the decibel level reduced six decibels for double the distance. This is just a graph of a chart that shows you distance so that you can read 1500 feet from the crossing what the decibel level would be without having to do all that arithmetic, and it doesn't apply to anything except the standards of how the horn degrades as a function of time.

I might add that that's the reason that people in different environments can hear a horn and others can't. Sometimes a man that is out with a fishing pole on a pond in a quiet environment can hear the train miles away, but someone at the same location enclosed in a vehicle that has a high noise level—[112] let's say a tractor trailer, the decibel levels inside a cab of a tractor trailer can go over 100. He doesn't have a chance of hearing the horn because he's already involved in a sound environment that's higher than the noise that is going to be projected from the horn.

Q (By Ms. O'Dwyer) Going back to the original study in 1991, in that study was there a—did you rely on that study—

MR. GIBSON: Your Honor, I object to her leading the witness.

THE COURT: Yes, sir, but I think the reason she was leading was to avoid another objection.

MS. O'DWYER: I was trying.

Q (By Ms. O'Dwyer) In the Aurelius study—did you rely on the Aurelius study?

A I did.

Q Is that study customarily relied on by experts in your field to determine these safety issues as to what type of warning needs to be provided?

A I think that's fair if it's a legitimate publication and study, and certainly the Aurelius is.

Q And does that study—did it support your [113] opinion both as to what you've just described about the inadequacy of the horn?

A Yes, it does.

Q What about the head lamp? Did it talk about the head lamp?

A That's also discussed there.

Q You've talked to us about the Code of Federal Regulations' definition of what the horn is designed for. Can you tell us about the head lamp?

A Well, it also has some stipulations about how bright it should be, 200,000—I always get this terminology mixed up—candelas, I think.

Q And how many number of feet?

A That's going to be projected at 800 feet in front of the engine.

Q Do you sometimes refer to them and say the wrong number of candelas?

A I have been known to.

Q But regardless of that recognizing that that is the brightness of it, what was it designed to do according to the regulation?

A I want to clarify what I just said. I didn't want to misstate things like turning them around backwards, 800 feet versus 200,000 candelas turning them around.

[114] MR. GIBSON: Your Honor, I need to interpose an objection here. I don't know that this witness has been qualified as being able to state what the regulation is designed to do. He's told us what the regulation is, but what he knows about the design intent of the regulation has not been established, and I object.

THE COURT: Same ruling as before. He can state what the regulation is, but the effect of that regulation seems to be the same thing as it was designed to do.

Q (By Ms. O'Dwyer) In the course of engineering and traffic engineering do you take into consideration what something is designed to do?

A Certainly.

Q And did you take into consideration that this particular head lamp regulation tells you what it's designed to do?

A Yes, and even more than that. I've conducted studies with other parties to validate the effects of lighting particularly in nighttime environment. That's what you led me to the conclusion that I offered to you earlier that when you've got an illuminated source off into the horizon, it's very easy to overlook when you go through and look that [115] way and see a third point source there and not appreciate it because particularly the further off it is, the slower moving it appears and appears almost stationary, so you can get deceived with the first glance to think, hey, nothing is different when, in effect, it is quite different if that point source is on the front of a locomotive that's barreling down on you 40 miles an hour.

Q Do you know what the regulation says that the light is designed to do? Can you tell us what it's designed to do?

A Basically it was designed to illuminate the tracks so the crew could know there weren't any deer or cows or anything on the tracks and that things were clear. It's not

designed to be a warning device for the public to pick up on. There are other things that have been added to the equipment now since then to do that.

MR. GIBSON: Objection, Your Honor.

THE COURT: That's—

MR. GIBSON: We've already gone into this.

THE COURT: Yes. I'm ruling in your favor. Don't go into those things.

A The light itself is to give indication of the [116] illumination in front of the train as opposed to being a warning to the traffic that here comes the train.

Q (By Ms. O'Dwyer) In your analysis of Mr. Shanklin's ability to perceive his own danger or to see the train, did you also consider the—

MS. O'DWYER: What I'd like to offer into evidence and offer to you, Mr. Gibson, for your sake, these are Exhibits 21, 22, and 23. These are where the crew marked on the—these are from the crew's depositions where they marked their first abiilty to see Mr. Shanklin.

MR. GIBSON: I've got a problem.

THE COURT: Well, Let's talk about that over here.

(The following proceedings were had at the bench by Court and counsel out of the hearing of the jury:)

THE COURT: What's the basis of the objection?

MR. GIBSON: Your Honor, I went through this Rule 26 disclosure, and the deposition this witness gives me indicates no notice that he would be asked to tell this jury what was available to the railroad that put them on notice. That was * * *

* * * *

[146] day of this accident? I believe fourteen was the train count that day, and did you say that nine was the FRA number?

A I don't remember that. I remember all those sources, and I settled on fourteen trains a day, and that's

the criteria I looked up in the FRA book to see how busy a crossing this was. I recall I found only thirteen percent of the crossings had more than fourteen trains a day.

Q And did you use the timetables to verify the speed?

A Yes. I validated it was a class 4 track.

Q Did you use the accident report of the death of Eddie Shanklin to validate the allowable speed of the—

A Speed limit of 55 miles an hour.

MS. O'DWYER: I believe we also had—we could offer this in admission by the defendant that this was a class 4 track allowed at 60; is that all right?

MR. GIBSON: Stipulated.

Q (By Ms. O'Dwyer) Now, are those the components that you relied on to determine that you had, what would be called, high speed trains?

A High speed trains, high volume trains.

* * * *

[41] THE WITNESS: May I step down?

THE COURT: Yes. Be sure to keep your voice up when you're away from the microphone.

THE WITNESS: Yes, sir.

A I had commented yesterday that the right of way for the railroad would encompass this greenery. I pointed to it, but I didn't mark it. I just want to show you—this little solid line here is the limit of an embarkment—the difference in elevation between the roadbed of the railroad of the railroad and the level of the greenery and grass that's beside there.

The railroad owns 100 feet of right of way, and that can be measured from the center of the rail, 50 feet on either side, which falls at a point that I will mark here merely to illustrate that much of the greenery that's shown on this drawing is actually on the railroad right of way. I'll draw a black line [42] here and mark it as the right of way. You can know that any of this greenery that's

shown right on top of the embarkment is on the railroad right of way. This greenery through here, even part of that tree, all of this tree, and partially this tree is actually encroaching on the railroad right of way. And, of course, that's part of the sight obstruction that I've referred to, and that's a correctable thing because it could be eliminated.

Q (By Ms. O'Dwyer) Mr. Burnham, you were—in noting this visibility problem or this vegetation problem, let me ask you, sir, if I can point you to the Tennessee statute that directs—and, again, you might rather come down—that directs what the driver—the duty of the driver as he approaches the crossing, and, if you could, sir, show us how visibility plays into it and into the—

MR. GIBSON: Your Honor, is the witness being asked to give a legal opinion on how to interpret the statute? If so, he couldn't testify. He's not qualified.

THE COURT: I agree. I'll tell the jury what the law is. Just ask this witness what the facts are, and I will tell them later what the law is.

[43] Q (By Ms. O'Dwyer) Recognizing—let me just ask you, did you rely in forming your opinion on what Mr. Shanklin was required to do at this crossing?

A Yes. I needed to become familiar with the requirements of the motorist.

Q And what of his requirements did you consider in determining whether or not the railroad was—in your opinion that there was causation?

MR. GIBSON: I object to the witness drawing a legal conclusion.

THE COURT: Hold on. I'm going to let you ask that question. This is not asking for a legal conclusion but a factual opinion. You can answer that question.

A Yes. The two essential elements that I evaluated in the degree of hazardousness here dealt with sight and sound, and both of those elements are contained in the

actual instructions under the law which I could point out to you here.

Q (By Ms. O'Dwyer) I would like for you to just circue those in red.

THE WITNESS: May I step down, Your Honor?

THE COURT: Yes, sir.

A (Witness is marking.) The first thing I [44] circled here is a little phrase in the law that says the train must be plainly visible and in hazardous proximity, and, of course, those are the language—key words in the language of the law that alert the motorist that he has an obligation to look for a train that's plainly visible and in hazardous proximity. And that's difficult at this particular location because of the things I've talked about, the limitations of visibility, the limitations that are placed by the greenery and the nighttime and things we discussed on Monday.

There's another portion of the law that says that it must emit a signal that is audible, and I also discussed with you on Monday that there are certain limitations to be able to hear the horn under certain conditions as it's blown in proximity to where the train is to where the motorist is and what its noise level is around that particular location. This merely just confirms that the two key elements of determining ultrahazardousness at a crossing are tied into the ability of the motorist to visibly see and audibly hear the approaching train, and those are the limitations that exist at this location.

* * * *

[54] Q (By Mr. Gibson) Where in the oversight committee minutes do you find the statement that the 96 decibel level is an industry standard?

MS. O'DWYER: May I pass that exhibit to the witness?

THE COURT: Let's, first of all, see if he needs an exhibit.

A I have it underlined in the review of those oversight committee notes that I have reviewed, but the audibility standard is a part of those minutes, and it's as such.

Q Standard or minimum?

A Minimum. I agree, minimum. I don't argue with that.

Q I'm trying to get an agreement between you and me. The 96 dB is the minimum; you have to have a horn at least that loud to comply with federal law?

A Yes. I think it's a plus or minus four decibel tolerance on the minimum.

Q And many railroads you know do have horns that are considerably louder than 96 dB; do you not?

A They have been tested on isolated incidents [55] to that effect, yes, sir. The only one that I know has been adopted for standard use is on an Amtrak train which use 115 decibels. But standard freight trains in all the other companies are at the 96 decibel level.

Q By what information they're all at 96? How do you know they're all at 96?

A I need to clarify. I'm not talking about testing at exactly 96 decibels because there is a tolerance in there of four decibels. But the industry has adopted the use of the horn in the 96 decibel area because mainly of the concern from the locomotive engineer about deafness and other problems of concern, complaint from the public of being too loud. 96 is the standard decibel level that's used on all other trains but Amtrak.

Q Now, Mr. Burnham, that's the minimum level; is it not?

A The minimum level, and the minimum level is what is used.

Q And the fact is that many horns or many locomotive freights—not Amtrak but many locomotive freight engines are higher than 96 decibels?

A They may test higher, but in my experience it's always been within that plus or minus four [56] decibels.

Q How many locomotive units have you tested with the sound meter?

A I haven't tested any personally, but I have read many tests that have been conducted.

Q And you certainly didn't test the locomotive involved in this accident personally?

A No, I did not.

Q When you were doing the sound meter testing at the scene of this accident, the locomotive wasn't present; is that correct?

A That's true.

Q You used a sound meter to measure the decibel reading you did take; is that correct?

A That's correct.

Q I believe they're shown on Plaintiff's Exhibit 34. These are the measurements you did take; that is, the one that says no activity and then inside vehicle, and then you made an estimate here; did you not?

A Yes, sir. That's the ones I had made and had estimated.

Q Now, did you use any other sound measurement device other than the sound meter in making these?

A No, sir.

[57] Q You did not use a calibrator?

A Correct, only a sound meter.

Q Do you recall what scale you used?

A Yes, sir. I had explicit directions about that. I'm sure I don't remember the nomenclature right now. I believe it was the C scale.

Q You used the C scale, and you did not have a calibrator in advance of these tests?

A No, sir. The instrument is automatically calibrated in the testing that is done before you activate the meter. It has a little area that shows you it is self-calibrated if it's within that area before you ever use the meter.

Q You did not use a separate calibrator?

A That's correct.

Q And you put it on the C scale?

A That's my memory.

Q I now want to ask you some questions about the visibility part of your testimony.

A Yes, sir.

Q I think you and I are in agreement, the standard that applies to crossing warning devices is the uniform—the manual on uniform traffic control devices; is that not correct?

[58] A That is a standard, yes, sir.

Q Well, it's the one that's adopted by the United States Secretary of Transportation for the railway and highway safety and highway safety in general; is that not correct?

A And by the State of Tennessee.

Q And the State of Georgia?

A Correct.

Q So it has the force of regulation in the State of Tennessee?

A Yes, sir.

Q Now, that standard provides, does it not, that traffic control devices shall be placed only by the authority of a public body; isn't that correct?

A That generally the devices are placed by a public body, yes. It depends on who owns the property. If it was placed on a city street, the city government, county, or county government—

Q But that's a public body.

A The state would be the state body, and the railroad would be a private body.

Q But it doesn't say anything about private bodies in the standard; does it? It says traffic control devices shall be placed only by the authority of a public body. [59] A It's speaking of those approaching the crossing, that's correct.

Q And with respect to the part of the standard, that is, the uniform manual that regulates the railroad warning devices, that's part 8; is it not?

A Yes, sir.

Q It provides that the determination of need and selection of devices of the grade crossing is made by the public agency; is that correct?

A Yes, sir.

Q In this case it would be the Tennessee Department of Transportation; would it not?

A That's correct.

Q Now, there is nothing in the standard, that is, the uniform manual that specifies the amount of advanced warning a motorist should be given when he or she approaches a crossing with just crossbucks; is there? There's nothing—

A The amount of visibility warning?

Q Or any kind of a warning. It doesn't specify; does it?

A Well, the manual specifies distances that are established for erecting the advanced warning signs and the pavement markings, yes.

Q The advanced warning sign in this case at the [60] Oakwood crossing complied with that requirement; did it not?

A Technically it may not have, but I think essentially it complied if it was present. It may not have been at the

exact position that it was so stipulated for the speed of the approach.

Q Let me hand you an exhibit which has been marked Defendant's Exhibit No. 1. Can you see from that angle? If not, could the witness—well, that's fine. Take a look at it. Do you recognize that to be the Oakwood crossing and the approach that Mr. Shanklin took to the crossing?

A Yes, sir, I do.

Q And what you mean by advanced warning sign; is that that circle sign there on the right?

A Yes, sir. That's the advanced warning sign.

Q And does that appear to be in compliance with the uniform manual?

A It does.

Q Is there any other advanced warning that you're aware of that is within the manual that would apply to this crossing?

A Yes, sir.

* * * *

[66] Q According to this document there has never been an accident at this crossing before Mr. Shanklin's accident that involved a personal injury; isn't that correct?

A There was one previous accident, but I don't believe there was an injury sustained; that's correct.

Q This document says that nobody was hurt, does it not, no injuries, zero?

A 1988 document, yes, that's right.

Q So my question—the answer to my question is—I mean, the response to my question is, yes, there have been no personal injuries according to the accident history at this crossing until Mr. Shanklin's injury; is that correct?

A That's correct.

Q Now, this other accident that you said, there was one in 1988, is that not right, where there were no injuries?

A Yes, sir.

* * * *

[68] Q So the car is going the opposite direction, and the train is going the opposite direction?

A Yes.

Q So as far as the accident history then shows at this crossing there has never been any accident with or without an injury at this crossing before Mr. Shanklin's accident involving a vehicle going in the same direction Mr. Shanklin was going; is that right?

A That's correct. I have no record of that.

Q Now, let me show you a few more photographs. Defendant's Exhibit No. 4, Mr. Burnham, can you tell—does that appear to be the same crossing—I know you haven't got as much perspective, and you may not be able to identify because I know you weren't there until long after the accident the first time. Are you able to identify that or not?

A Yes, sir.

Q Is that the Oakwood crossing or at least a shot from the road—

A I believe it is. This building had been removed when I attended the location.

* * * *

[73] Q And traveling at 20 miles per hour Mr. Shanklin was traveling at approximately 30 feet per second?

A Yes, sir.

Q 30 feet per second, so his reaction time gives you your number. Would it be 75 feet embankment?

A Yes, sir.

Q Now, if I understand your testimony on Monday, your reaction time of 2.5 seconds is based upon the reac-

tion time of a driver encountering an unexpected event; is that right?

A That's the design criteria, yes.

Q And I also understand from your testimony and this chart—it's not apparent on the chart, but you've testified as to Plaintiff's Exhibit 2 that Mr. Shanklin could have seen the train when he was 94 feet from the crossing; is that right?

A Yes, sir. If you will remember, my computer module tied down exactly where the train and the vehicle were with respect to each other.

Q Mr. Burnham, isn't that crossbuck sign at the crossing the equivalent of a yield sign?

A Not in my judgment, no, sir.

[80] Q When you were with the Georgia DOT, was it—if the railroad had come to you and told you they wanted to spend their own money, not even ask for state money, would they have gotten approval of the type?

A Certainly. The state will accept candidates that are not on their priority list if they're paid for with other funds than what the state has to pay.

Q The previous accident in 1988 on October 2nd, I believe, just almost on the anniversary date of this accident, does that—the fact of that accident, whether it happened in exactly the same way, have any effect on your opinion as to whether or not Norfolk Southern was aware they had a problem with the crossing?

A Yes, it does.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF WILLIAM CANTRELL AND NELSON CHRISTIANSON

* * * *

[65] A [Mr. Cantrell] I am currently a Transportation Manager 1 and employed in the—now, in the rail and waterway division.

Q [Mr. Gibson] What are your duties, in very general terms?

A I act as secretary of the Tennessee's diagnostic team for railroad and highway grade crossings.

Q Has the Tennessee Department of Transportation volunteered to participate in the federal rail-highway crossing safety program?

A They have.

Q How many federal aid programs do you personally administer?

A I'm in charge of the minimum protection program and the hazard priority listing.

Q All right, you've given me two programs. One you called minimum protection; is that right?

A Yes.

Q And the other you called a priority program; is that right?

A That's correct.

Q Do you administer any other railroad grade crossing safety programs that are not sponsored by the federal government?

A Fatality program.

Q And very briefly, what is that?

A Under Section 65-11-113 and 65-11-114 of the [66] Tennessee Code Annotated, any crossing that experiences a fatality within a six-month period, if it has one hundred traffic count, regularly scheduled trains, regularly scheduled school buses, then the department will start a project to go to active warning devices—that is, lights or lights and/or gates—at that crossing.

Q I want to you ask you a few more questions about the priority program, which is federally sponsored; is that right?

A Yes.

Q How is priority determined at a particular crossing in the state of Tennessee?

A Several years ago—well, the—with the 1973 Highway Transportation Bill—or, actually, '72—they decided that they would have this program. And they include several different types of formulas. And, finally, the FRA, in conjunction with—or the Federal Railroad Administration. I'll try to remember not to talk in—

Q Lingo?

A —lingo here. —and the American Association of Railroads, I believe, if I'm not incorrect, hired a bunch of MIT boys to come up with a formula to predict accidents at railroad crossings.

Q The formula, then, predicts whether an accident is likely at a particular crossing, or is that—is that—

[67] A That's correct.

Q What factors does your department consider to determine relative degree of hazard at crossings using this formula?

A In the formula, not only—it takes into consideration the type of protection there, the year the protection was implemented—

Q What's already there?

A Yes.—the train—number of trains a day. Number of day through trains. The amount of the traffic. The percent of trucks. The function class of the road, what type it is. How many lanes of traffic. Whether it's paved or not paved. In all, with—currently, there are 3,459 crossings, we think, at this time, public crossings.

Q In Tennessee?

A In Tennessee. And all told, taking in consideration the number of factors, you're looking at fifty-thousand-plus factors involved in this computer program.

Q How about crossing accident history? Is that also a factor?

A Yes. I'm sorry. I failed to mention that.

Q But does the computer calculation of relative degree of hazard include sight distance?

A No, it does not.

[68] Q Is every one of these 3,425—or fifty-nine public crossings in Tennessee evaluated by—

A Yes; by the computer.

Q And how frequently?

A Yearly.

Q What do you do when a crossing reaches priority; that is to say, its hazard ranks far enough, high enough, to be treated on a priority basis?

A First of all, we determine—we verify the information that, more or less, kicked it out—you know, that brought it to our attention—and verify every traffic count; every percent of trucks and so forth. As a general rule, it's most accurate; but occasionally we do get a bug. You know, the computer will throw a number or something like that. But as a general rule, they're right on the money.

And then I had formed a diagnostic team of various engineers, and—

Q Highway engineers?

A Highway engineers; that is, with the Tennessee Department of Transportation. And I even had, for the last few years, a representative from the Federal Highway Administration that was an engineer with them on my team.

Q And would the diagnostic team actually go to the particular crossing?

[69] A Yes, they would.

Q Do you diagnostic teams always recommend that automatic signals be installed when you go to a particular crossing?

A No, they don't.

Q What is the standard adopted by the Tennessee Department of Transportation for traffic warning devices?

A The department has devised the Manual on Uniform Traffic Control Devices, otherwise known as the MUTCD.

Q And are reflectorized crossbuck signs warning devices that are permitted by that manual?

A Yes, they are, under a certain design and specifications.

Q Is there a confidentiality statute under federal law that prohibits you from giving data on a particular crossing? Like in this case we're considering the Oakwood crossing in Gibson County, Tennessee.

A Yes. Under U. S. Code 409, there are certain things that are not available for depositions or disclosure of any sort.

Q Even in court?

A Even in court.

Q And are you—because of that statute, are you able to tell this jury how Oakwood Road crossing ranks on the hazard index?

[70] A No, I'm not. My efforts are to remain unbiased, just like this judge and this jury.

Q Are you able even to tell the jury whether or not you've ever taken a diagnostic team to the Oakwood Road crossing?

A No, I can't say that.

Q Because of the confidentiality statute?

A Yes, that's true.

Q Now, let's skip to the next federally-backed program, and I believe you called that the minimum protection program; is that correct?

A Yes, that's the name we put on it.

Q Now, once you do some work at a particular crossing, then you can tell us what you did; is that right?

A Well—

Q In spite of this confidentiality statute, once you do some work, you can then tell a lawyer, the jury, the judge what was done at a particular crossing; is that right?

A Yes. Yes.

Q And did the minimum protection program include the Oakwood Road crossing?

A Yes, it did.

Q Describe, briefly, what the minimum protection program consists of.

A Under the minimum protection program—Under the—[71] US 130—Section 130(d), we were to put, at a minimum protection, a sign protection at crossings.

Q In compliance with the uniform manual?

A Yes. Well, no. That was part of the original statute.

Q Okay.

A Someone determined—apparently, prior to my arrival into the program—that Tennessee would put, at a minimum—hence, the name—two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would

take it. Obviously, we wouldn't put advanced pavement markings on a gravel road.

Q Now, if—

A Or—Go ahead.

Q Were any employees of the department sent to various crossings to see what needed to be put there?

A Yes, there were.

Q And do you have a record of what work was actually performed at these various crossings?

A Yes, we do.

Q I hand you a document that's been marked defendant's exhibit 18. Can you identify that document for us.

A This is page 2C from a federal project, RRO-OOOS parentheses 347, parentheses closed.

[72] Q RRO-OOOS—

A Parentheses 347, parentheses closed.

Q All right. And is Oakwood Road included in that project?

A Yes, it is.

Q Can you tell from defendant's exhibit 18 what was done at Oakwood Road crossing as a part of this minimum protection program?

A At location code A, which was Oakwood Church Road, according to this, we actually went out there and removed two crossbucks; apparently, because they were substandard or perhaps the deer hunters had used them for targets. I'm not sure why, but—and replaced them with two reflectorized crossbucks.

We installed what they call a W10-1 sign on one approach and then two W10-2 signs on State Route 43.

Q I now hand you a document marked defendant's exhibit 19. Is that—does that appear to be a page or maybe a portion of a page from the uniform manual

describing the advanced warning devices you just related to the jury?

A Yes. There's a—W10-1 is a 36-inch-diameter sign. And there's a W10-2 on the same sheet that's 30 inches by 30 inches square.

Q Now, here's a photograph of the crossing taken some distance back. It's been marked defendant's exhibit number [73] 1. Do you see a circle in that photograph?

A Yes. That's the W10-1.

Q Is that in compliance with the uniform manual—does that appear to be?

A Yes.

Q I don't know whether you can see all you need to see or not, these crossbuck signs themselves, but I'll hand you defendant's exhibits 3, 4 and 5 and ask you to see if you can tell, just with the naked eye, from those photographs whether those crossbuck warning signs at the crossing appear to be in compliance with the uniform manual?

A Well, actually, I can't tell, you know. You would—

Q Look at the other crossing—

A They appear to be. But, I mean, to actually tell whether or not they're diamond-sheeted, 3M quality, you would have to be within about four or five feet of them.

Q But your intention was to comply, is that correct—

A Yes.

Q —with the minimum protection program?

And what does that diamond sheathing and all that other stuff you just described do for the crossbuck to help warn motorists?

MS. O'DWYER: Your Honor, since he testified he can't say what's up there, I object to him saying what it's intended to do.

* * * *

[78] BY MS. O'DWYER:

Q Mr. Cantrell, have you ever just driven by the Oakwood Road crossing? Have you ever driven by the Oakwood Road crossing, going to it just casually for any purpose at all?

THE COURT: Unrelated to your work.

A Not to my knowledge.

BY MS. O'DWYER:

Q And other than being shown this picture, have you ever seen the crossbucks to know whether they have any particular—you know, any 3M product or whatever? I'm talking about the ones at this crossing. Are you even the person—

A Yes. I suppose—I mean, if I'm going to answer that, then, yes, when we did our fatality investigation, they were in compliance.

Q All right. Now, this minimum protection program and the fatality program—I'm sorry, the priority program and the fatality program, they're not in any way connected with the minimum protection program other than being administered by your office?

A That's correct.

Q Okay. Is there any engineering judgment that was used—I think you described this team of people on the minimum protection program that were from somewhere else [79] that gave up some standards and said—or made up some standards and said this is what you need as minimums at crossings. Was there any actual engineering judgment done by anyone under your control in the state of Tennessee that looked at this crossing and said minimum protection will be enough; it's adequate?

A No. See, the decision—we came in—the program had already been started, and they had already done state

routes and stuff like that. Someone up above us had made the decision, and we went by policy. In other words, it's a recipe type thing. And the people that actually went out to do the signing were design engineers with no railroad experience. So it was just—the decisions of what to put out there and so forth were done at a higher level.

Q I believe you used the phrase with me before, "sort of monkey see, monkey do"?

A I'd rather not use something—Recipe would be more like, you know—Making sure that everything has some sort of protection.

Q And, also, have you—was this made necessary because the railroad, as part of one of the entities that had responsibility for this crossing, had, as I believe—

MR. GIBSON: Objection, Your Honor. I don't understand the question. Was what made necessary?

MS. O'DWYER: The minimum protection, the [80] mop-up.

BY MS. O'DWYER:

Q Didn't you call this at one time, Mr. Cantrell, a mop-up detail?

A It was a mop-up in the fact that we were getting the last of what was left. In other words, like I said, somebody had done state routes already. Somebody else had done federal—in fact, we came in on the end of the federal aid urban. So we were doing the mop-up or the last of the program that was already in the works.

Q And what I was asking you about was, didn't you tell me that this was made necessary because the railroad, as one of the entities that had responsibility for this crossing, had dropped the ball?

MR. GIBSON: I object, Your Honor. That's not a proper question, as to what the railroad did or—that's—This witness is not qualified to comment on that.

THE COURT: Well, let's have another sidebar.

(Bench conference. Ms. Steele present)

* * * *

[85] Q In this particular mop-up detail, what was the role of the federal government? And I mean very specifically. Would you be able to say—Would it be fair to say that they merely funded, funneled and signed off on this project?

A Funded—

Q —funneled and signed off.

A Ran it through the thing? It's not a major project, by any means. I mean, we would spend millions on a bridge, and you can go out and—at one of these crossings that we see made a Cadillac and you've only spent two thousand dollars in signing.

Q You're talking about under the minimum protection program?

A Yes. Thank you. I'm sorry about that.

Q Would you say that the expenditure at the Oakwood crossing would be considered insignificant by comparison?

A Insignificant to some of our—yes. Some of our [86] roadway projects? Yes. I mean, you know, supposedly, they have somebody that picks out a few locations. This one involved 196 locations, so, obviously, they don't visit every one of them, like our team did. But more than likely, they did a random check on it and signed it.

Q Now, we've talked a little bit about some law that's in effect now that doesn't let you talk about whatever is—you know, is going on out there or has been done out there. But back in 1988, before this became fashionable to exclude this, were your files open to the public and to the railroads?

A I'm not sure when that came into play.

Q But at least prior to—

A Somewhere along in there, I believe.

Q Let's go back to like, say, 1991. Prior to 1991, wasn't it your practice to—say, for instance, if Mr. Gibson wanted to come up or some lawyer for the railroad wanted to come up, they could some up and talk to you freely without the state being there, go through your file and see what sort of—

MR. GIBSON: Without the state's attorney?

MS. O'DWYER: That's right.

THE COURT: I'm sorry, Mr. Gibson? I hear lawyers better when they're standing.

* * * *

[91] MS. O'DWYER: I would like to offer this as a—if it's held out. I'd like to offer it.

THE COURT: Mark that as an offer of proof, the next offer of proof. The objection is sustained, but make it a part of the record.

(Bench conference concluded)

BY MS. O'DWYER:

Q I have just one last question, Mr. Cantrell. If the railroad had come to you and offered you a plan telling you—and you don't have to study that, but I'm just showing you as an example of the type of plan that the railroad might have offered. If they had contacted the state and offered a plan that showed that they were going to put up lights, bells, gates, whatever they deemed to be adequate protection for this crossing, and they put in their request that they were going to pay for these signals themselves, and you could examine it and you could determine that the signals met what you deem to be in compliance with your manuals that you use. would the state have ever done anything but approve that by turn-

around [92] mail? After you studied it and determined that the type that they were offering to put up was in compliance?

A We would have taken that deal in a heartbeat.

Q Okay. All right.

MR. GIBSON: I have one question on redirect.

THE COURT: Yes, sir.

MR. GIBSON: I need to find an exhibit. Here it is.

REDIRECT EXAMINATION

BY MR. GIBSON:

Q You were asked about page 82 in the Railroad-Highway Grade Crossing Handbook, which is the sight distance or sight triangle exhibit. Excuse me just a second, Mr. Cantrell. I need it back.

A Yes, sir.

Q That's plaintiff's exhibti 23 in this record. Is that the page she referred you to? Does that appear to be the page?

A I suppose it is. It appears to be; yes.

Q All right. And have you seen that before, that page, page 82, with that sight distance triangle?

A I believe I have.

Q When you, as a member of—as a traffic engineer with the Tennessee Department of Transportation, and in conjunction with traffic engineers with the Federal Highway [93] Administration, go as a diagnostic team to these crossings, do you always follow the dictates of that exhibit?

A No, I don't.

MR. GIBSON: That's all.

(Witness excused. Jury admonished and excused for lunch at 11:45 a.m. Discussion off the record between the court and the clerk)

THE COURT: All right, Ms. O'Dwyer, you indicated you wanted to examine Mr. Cantrell while the jury is out. You may proceed.

MS. O'DWYER: Thank you, Your Honor.

FURTHER CROSS-EXAMINATION

BY MS. O'DWYER:

Q Mr. Cantrell, historically, in the time—or early eighties, did you have participation from the railroads in your diagnostic study of crossings, particularly the Oakwood crossing? Did you ever have participation from the railroad in that?

A The program was in terrible shape; and we, historically, did about three and a half million dollars a year, and it accumulated up to quite a pile under my predecessor. And we initially tried to include railroads in our diagnostic studies; but, by logistics, it became a nightmare.

* * * *

[97] Q Are you paid by the federal government?

A I'm paid by the state, unfortunately.

Q And do you—did I ask you earlier if this department of transportation has adopted the MUTCD as a standard?

A I believe you did.

Q Is there any level of protection lower than a crossbuck?

A We do have some crossings out there that have no protection. They are purposely hand-flagged. They are oddities, but we do have a few. And I consider them less.

Q And are you speaking—when you're speaking here today, or testifying, or even in your work, are you speaking for the secretary of transportation in any way?

A Pena? No. For the State of Tennessee, yes.

Q Are you making a federal decision?

A No.

THE COURT: Mr. Gibson, do you have any questions?

MR. GIBSON: No.

(Witness excused. Recess at 11:50 a.m. to 1:25 p.m. Jury in)

* * * *

[Jury Out]

[104] Q [Mr. Gibson] Let me hand these documents to you and ask if you can identify the—first, defendant's exhibit 20. Is that the authorization for the project?

A [Mr. Christianson] Yes, it is.

Q And that was approved by the Federal Highway Administration as well as your department; is that correct?

A It was approved by the Federal Highway Administration.

Q This is exhibit 21, defendant's exhibit 21. Is that the contract entered into between the Federal Highway Administration and the Tennessee Department of Transportation for this project?

A It's the federal aid project agreement.

Q And defendant's exhibit 22, is that a final acceptance report?

A It's a final inspection report.

Q Exhibit 23, is that a completion letter, and is it dated December 3, 1987?

A Yes, it is.

Q Defendant's exhibit 24, is this the—another final certification?

A It's the final acceptance of the project.

Q Defendant's exhibit 25, is that the voucher submitted for payment to the federal government?

[105] A Yes, it is.

Q And defendant's exhibit 26, does that document indicate that about 99 percent of the money spent on this project was, in fact, paid for by federal funds?

A Yes, it does.

MR. GIBSON: Your Honor, that's all I have.

I move the introduction of defendant's exhibits 20 through 26 as an offer of proof.

THE COURT: All right, those are admitted for an offer of proof only.

Ms. O'Dwyer, do you want to cross-examine for the offer of proof?

MS. O'DWYER: Yes, sir, I do.

CROSS-EXAMINATION

Q Mr. Christianson, the funding for that project, do you actually handle the transmission of the check itself?

A No, I do not.

Q And do you know whether or not these—the actual check from the government that comes into—comes into a fund that is made up of other funds? Are there funds commingled from other sources to make up the funds you use with which to pay these projects?

A I don't know that I exactly understand your question or—You're talking about the federal funds?

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF JACK LANDERS

* * * *

[53] Q [Mr. Gibson] And do you have an estimate of the speed of the train as you approached this crossing?

A I guess approximately thirty-seven miles an hour.

Q Did you see the automobile involved in the accident before impact?

A Yes, sir, I did.

Q Where was the train—that is, the very front of the train—when you first saw the automobile?

A I'm guessing about a hundred to a hundred and fifty feet from the crossing.

Q Where was the automobile?

A Approximately fifty to sixty feet, in that range.

Q Could you determine the approximate speed of the automobile?

A I guess about—between fifteen and twenty-five miles per hour.

Q Could you tell whether or not the automobile was slowing as if to stop for the train?

A No, sir, it didn't appear to be.

Q When you realized that it was not slowing to stop for the train, what did you do?

A I hollered for Mr. McAnally to big hole the train, and I pulled the brake handle on my side.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF SCOTT PLUNK

* * * *

SCOTTY PLUNK, PLAINTIFF WITNESS,
WAS SWORN

DIRECT EXAMINATION

BY MS. O'DWYER:

Q Mr. Plunk, let me ask you, sir, whether or not you can recognize this affidavit. Do you have a copy of that?

A Yes, ma'am.

Q Do you have it? Is that something that you have in your hand?

A Yes, ma'am, I have it in my hand.

Q All right, you can recognize this. It's been marked as plaintiff's exhibit 37 for offer only as your affidavit [111] you gave in the case of Carl Richard Howard and wife, Linda Howard, parents and next of kin of Jennifer Howard, against Norfolk Southern Railroad Company. Let me ask you, sir, attached to that affidavit, if you have it there, is some copies of documents from Nelson Christianson's deposition which are marked—the Certification Acceptance Final Inspection Report is marked as exhibit 4 to that deposition; and, also, the Final Inspection of Federal Aid Project Constructed Under 23 USC 117 is marked as exhibit 6. Do you recognize your participation in those documents?

A Yes, ma'am.

Q Okay. Did you and Mr. Sellers—I believe Mr. Sellers has now left the employment of the state and gone to live in—do you know where?

A He was with the Federal Highway Administration.

Q That's right. Were you a state employee at the time these were made?

A That is correct.

Q And Mr. Sellers was, in fact, a federal employee?

A That is correct.

Q And do you recall whether or not you had ever—at the time these documents were executed, whether you had actually, quote, inspected or gone to the Oakwood Road crossing to look at the workmanship that was done there to see whether or not it gave adequate warning to the public?

[112] A I do not recall ever inspecting that crossing; no, ma'am.

Q Can you tell us—I take it that everything in your affidavit is truthfully stated?

A I think so.

Q Okay.

MS. O'DWYER: Your Honor, I believe I'll just rely on the affidavit itself and ask that that be accepted as the—

MR. GIBSON: May I see that? Hold on. Just let me check for one second to see if there's any hearsay that I want to raise, Your Honor.

I have no objection to the affidavit which is plaintiff's exhibit 37 as an offer of proof, Your Honor.

THE COURT: All right, mark that as a part of the offer of proof.

CROSS-EXAMINATION

BY MR. GIBSON:

Q Mr. Plunk, you do not purport to speak for the Federal Highway Administration in any regard; is that correct?

A No, sir, I do not.

Q You have some authority to speak for the state department of transportation but not for the Federal Highway Administration.

[113] A That is correct.

MR. GIBSON: That's all I have, Your Honor.

REDIRECT EXAMINATION

BY MS. O'DWYER:

Q Let me ask you this then, Mr. Plunk. At all times when you were doing the inspection of these 196 crossings, were you with Mr. Sellers during any time that you all would have been out doing any inspections?

A Yes.

Q Do you know if you made some random inspections of other crossings?

A The dates that we were inspecting, we did not inspect every crossing that was listed. We made random inspection of several crossings throughout the different counties to ensure that the contractor—I believe his name was—I believe it was C&D Safety. That they had fulfilled their contract of the installation of crossbucks, or whatever was the minimum set up on the plans. I can't recall everything at this time. And that's all we were doing, was to check to see that that contractor had fulfilled his contractual obligations.

Q You were not making an engineering study to say that they were adequate.

Was Mr. Sellers going to different crossings than you were?

[114] A No, ma'am. We were going to the same crossings. He was riding with me. We were not making any—All we was doing was inspecting the items that were listed in that contract for the contractor to do.

Q Would there have been any way physically possible for you and Mr. Sellers to have seen 196 crossings over eleven counties in the space of time that it took you? I think—It looks like you did this over a—from November 3rd to November 18th?

A It was random sampling. It was not—it was not every crossing that we inspected; no, ma'am.

Q You're from around here; correct?

A That is correct.

Q Do you think you would remember if you took Mr. Sellers to the Oakwood Road crossing?

A I don't recall—I don't recall going to it, and he would have been riding with me, so I do not feel at that time that we went to it.

Q Okay. Thank you, sir.

MR. GIBSON: Nothing further, Your Honor.

THE COURT: All right, sir, you may step down.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF TOM ROSE

* * * *

[47] A [Mr. Rose] The first segment, the one coming up, the first segment, is the sound in the car when the car is one hundred feet from the intersection with the engine running, being raced up to the speed that it would be running if it were traveling twenty miles an hour.

BY MR. GIBSON:

Q [Mr. Gibson] Where is the train?

A The train is two hundred feet down the track.

(An audio tape was played)

A Disregard what you're about to hear.

(An audio tape was played)

A The next recording you're going to hear is with the train moved—excuse me, the car moved back to two hundred feet from the intersection. The train is at four hundred feet. And the engine is off. Again, the car is at two hundred feet.

(One audio tape was played; then a second one was played)

BY MR. GIBSON:

Q Is this a disregard?

A No. Yeah, this is a disregard.

[48] (The second audio tape was then concluded)

A Okay, the next one coming up—I have a little egg on my face, as you heard. The next one coming up is at two hundred feet—the car is at two hundred feet, the same as before. The train is at four hundred feet, the same as before. But now the engine is running; and the recording, as you can tell, is terrible. It's extremely muddy. There was a malfunction, but I think you can still tell that the horn is—you can tell the horn is there sometimes and not there at others.

And this is to be listened to. The car is at two hundred feet; engine on.

(An audio tape was played)

A The next series will be the last, and disregard the next—the next batch that will you hear.

(An audio tape was played)

A Okay, the last tape segment. This you should listen to. The car is four hundred feet back from the intersection. The train is eight hundred feet from the intersection. The engine of the car is on. Again, the car is at four hundred feet.

(An audio tape was played)

A That concludes the tape portion. And please bear in mind that all of these were inside the car with the car windows closed.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

TESTIMONY OF GLENN TAYLOR

* * * *

[117] Q [Mr. Gibson] Now, I'm going to hand you some photographs that have already been admitted into evidence in this case as plaintiff's exhibits 5, 6, 7, 8. Was there a photographer on the scene, a professional photographer?

A Yes, sir. I called for one.

Q And did you remain on the scene to conduct your investigation after it became daylight?

A Yes, sir.

Q Would you please look at those four photographs and tell me if they appear to be photographs taken at the accident scene while you were still making your investigation.

A Yes, sir, they are.

Q And do they fairly depict the conditions at the scene as observed by you?

A Yes, sir.

MR. GIBSON: I have no further questions, Your Honor.

* * * *

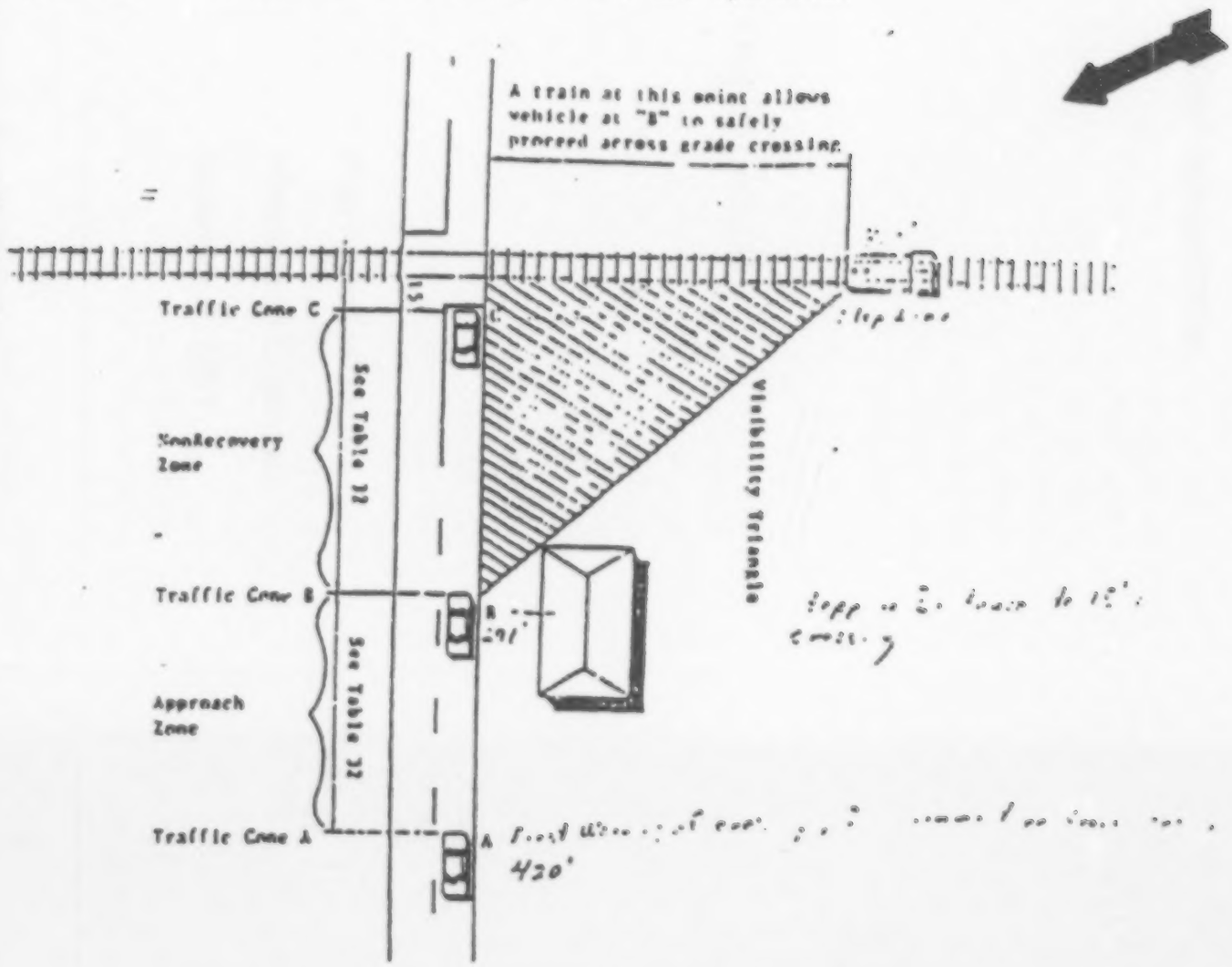


Figure 16. Study Positions for Diagnostic Team

Table 32. Distances to Establish Study Positions for Diagnostic Team Evaluation

Design Vehicle Speed (mph)	Distance from Stop Line[a] to Cone A (ft)	to Cone B (ft)
30	450 - 625	210
40	600 - 825	325
50	750 - 1025	475
55	875 - 1150	555
60	1000 - 1275	645
70	1100 - 1450	850

[a]The distance from the stop line is assumed to be 15 feet from nearest rail.

applicable to crossings with a high level of complexity.

Cone B is placed at the point where the driver must be able to see an approaching train so that a safe stop can be made if necessary. This point is located at the end of the approach zone and the beginning of the nonrecovery zone.

Distances to point B are based on the design vehicle speed and are shown in Table 32. These distances are stopping sight distances to the stop line (15 feet from the track) and are identical to the values in Table 36, Chapter IV (less the 15 feet). In calculating these dis-

EXHIBIT 23

BEST AVAILABLE COPY

123

GRADE CROSSING

OVERSIGHT COMMITTEE

[Graphic Omitted]

Presentation to

Management Committee

September 7, 1993

NS/NORFOLK SOUTHERN

Norfolk—October 8, 1993

* * * *

Enclosed is Norfolk Southern's new Corporate Policy on Highway/Railway Crossing Safety. We all know that many persons including NS employees, are injured or killed in grade crossing accidents. Grade crossing accidents are also a leading cause of damage to Norfolk Southern property and delay to NS trains. For the last several years, NS consistently has had the highest number of crossing accidents and the worst rate of such incidents among major railroads. This is not acceptable for NS.

We have established a corporate goal to make the NS crossing safety record the best in the industry. To achieve this goal, we must actively identify and correct crossing hazards on our lines. We also need to better coordinate our many existing crossing safety activities. Perhaps most important, we need to work with the states to insure maximum participation by NS in government funded signalization programs.

I have asked the system Grade Crossing Oversight Committee to implement the Corporate Policy and Jim McCloskey will serve as interim coordinator until the new program is up and running. Over the next several months, Jim will be calling on you and your people for assistance with this important matter. I know that you will see to it that everyone is made aware of this important effort and will work diligently toward our goal. As railroaders, we all should be active participants in grade crossing safety—as we are in all aspects of safety.

/s/ D. R. Goode
D. R. GOODE

Attachment

cy: J. B. McCloskey

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Caption Omitted in Printing)

AFFIDAVIT OF T.H. SELLERS

STATE OF NORTH CAROLINA:

COUNTY OF WAKE:

I, T.H. Sellers, after first being duly sworn, do hereby state that I am over the age of eighteen (18) years and that I have personal knowledge of the facts contained herein.

1. At the time of the making of the two (2) documents which are attached hereto as Exhibits "A" and "B" to my affidavit, I was employed by the federal government as Highway (Area) Engineer with the majority of my duties being focused on highway matters.

2. Any inspection of the crossings was being done to bring these 196 crossings up to minimum standards.

3. Our function was not to act as a diagnostic team, there was no railroad participation in any inspection and no engineering decision by the federal government was being made.

4. The federal government relied on the Tennessee Department of Transportation as having the ultimate decision-making authority as to what type of protection would be installed at the crossings.

5. Our method of inspection was to look at a representative number of crossings in the group and if we

found problems with the way in which the work had been performed by the contractors, we would then look at additional crossings. Our goal was to see if the work had been done properly before the federal funds could be released after the fact to pay the contractors.

6. There are no records kept indicating which of the 196 crossings were checked for proper workmanship. In the two working days, site inspections of all 196 over 11 counties would not be possible.

7. We were approving the funding based on the State of Tennessee's decision. We were not making a federal decision as to the adequacy or sufficiency of the protection being installed at the crossings.

Further affiant saith not.

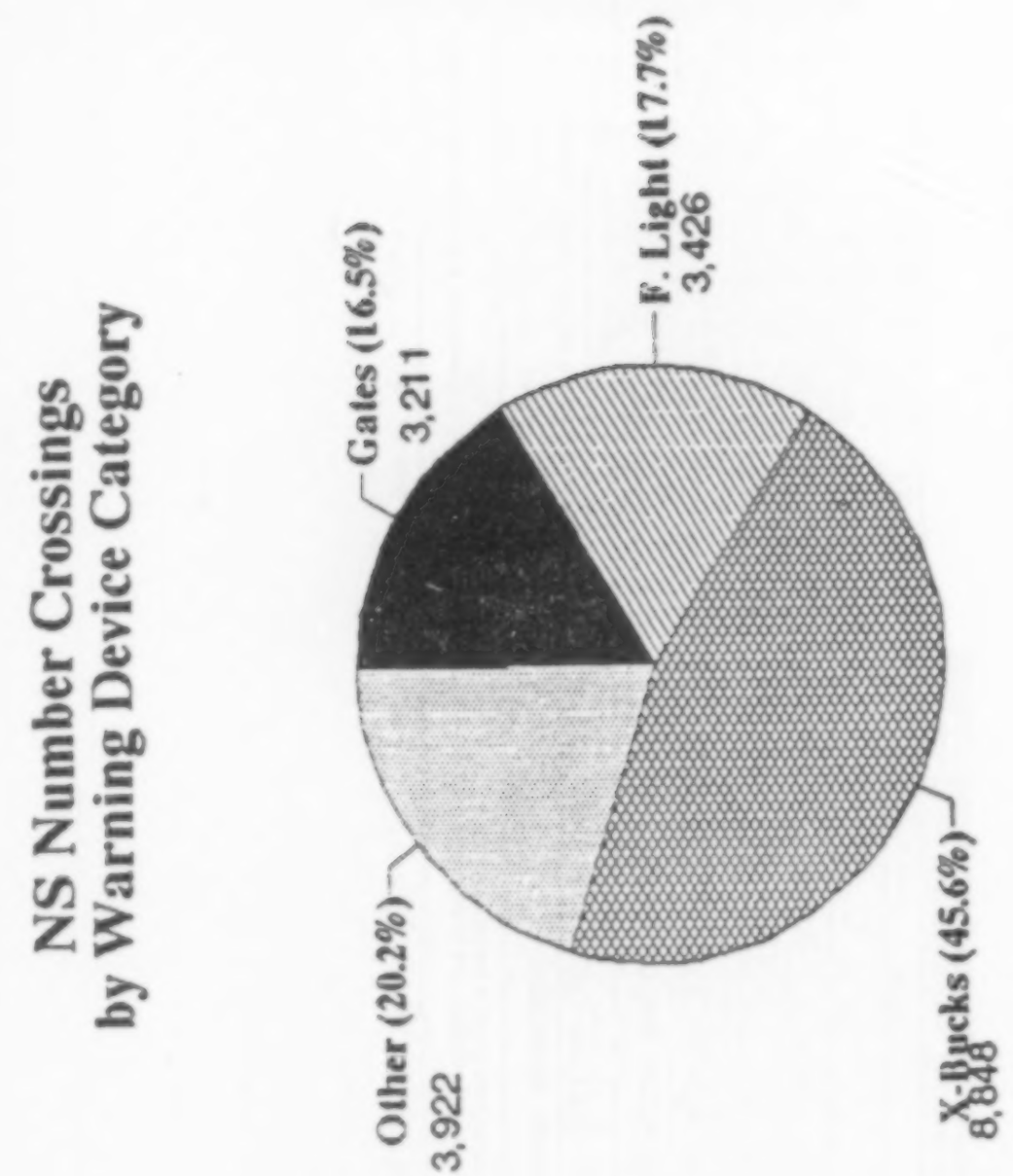
/s/ T.H. Sellers
T.H. SELLERS

[Notary Seal]

Sworn to and subscribed before me this the 17 day of Nov., 1995.

/s/ Martha Madden
Notary Public

My Commission Expires: 9/19/98



TO BE COMPLETED BY FHWA	U.S. Department of Transportation — Federal Highway Administration — FEDERAL-AID PROJECT AGREEMENT — 98040-3454-94	STATE TENNESSEE
		COUNTY Regionwide
		PROJECT NO. RRD-0008 (347)

The State, through its Highway Agency, having complied, or hereby agreeing to comply, with the applicable terms and conditions set forth in (1) Title 23, U.S. Code, Highways, (2) the Regulations issued pursuant thereto and, (3) the policies and procedures promulgated by the Federal Highway Administrator relative to the above designated project, and the Federal Highway Administration having authorized certain work to proceed as evidenced by the date entered opposite the specific item of work, Federal funds are obligated for the project not to exceed the amount shown herein, the balance of the estimated total cost being an obligation of the State. Such obligation of Federal funds extends only to project costs incurred by the State after the Federal Highway Administration authorization to proceed with the project involving such costs.

74-1233 (4-4-87)

PROJECT TERMINI

196 Off-System R/R Crossings in Chester, Crockett, Fayette, Gibson, Hardeman, Hardin, Haywood, Lauderdale, McNairy, Tipton, and Weakley Counties.

PROJECT CLASSIFICATION OR PHASE OF WORK	EFFECTIVE DATE OF AUTHORIZATION	APPROXIMATE LENGTH (Miles)
HIGHWAY PLANNING AND RESEARCH (HP & R)		
PRELIMINARY ENGINEERING		
RIGHTS-OF-WAY		
CONSTRUCTION	4-2-87	0.0

OTHER (Specify)

Low Bid	116,317.00	117,134.00
E & C 10%	11,832.00	11,714.00
Total	130,149.00	128,848.00

CONTRACT NO. 6533 WITH C & D Safety Company, Incorporated FOR CONSTRUCTION.

FUNDS

ESTIMATED TOTAL COST OF PROJECT	FEDERAL FUNDS
$ 130,149.00	$ 128,848.00

The State further stipulates that as a condition to payment of the Federal funds obligated, it accepts and will comply with the applicable provisions set forth on the following pages.

TENNESSEE DEPARTMENT OF TRANSPORTATION
(Official name of Highway Agency)

By _____

ACTING FOR THE COMMISSIONER

(Title)

By _____

(Title)

By _____

(Title)

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

By _____
(Division Administrator)

Date executed by Division Administrator: JUN 12 1987

FORM PR-2 (REV. 1-84) PREVIOUS EDITIONS ARE OBSOLETE

AGREEMENT PROVISIONS

1. RESPONSIBILITY FOR WORK.
a. Except for projects constructed under Certification Acceptance procedures, the State highway agency will perform the work, or cause it to be performed, in compliance with the approved plans and specifications or project proposal which, by reference, are made a part hereof.
b. With regard to projects performed under Certification Acceptance procedures, the State highway agency will perform the work, or cause it to be performed, in accordance with the terms of its approved Certification, or exceptions thereto as may have been approved by the Federal Highway Administration.

2. HIGHWAY PLANNING AND RESEARCH (HP&R) PROJECT. The State highway agency will (a) conduct or cause to be conducted, under its direct control, engineering and economic investigations of projects for future construction, together with highway research necessary in connection therewith, pursuant to the work program approved by the Federal Highway Administration and (b) prepare reports suitable for publication of the result of such investigations and research, but no report will be published without the prior approval of the Federal Highway Administration.

3. PROJECT FOR ACQUISITION OF RIGHTS-OF-WAY. In the event that actual construction of a road on this right-of-way is not undertaken by the close of the tenth fiscal year following the fiscal year in which this agreement is executed, the State highway agency will repay to the Federal Highway Administration the sum or sums of Federal funds paid to the highway agency under the terms of this agreement.

4. PRELIMINARY ENGINEERING PROJECTS. In the event that right-of-way acquisition for, or actual construction of the road for which this preliminary engineering is undertaken is not started by the close of the fifth fiscal year following the fiscal year in which this agreement is executed, the State highway agency will repay to the Federal Highway Administration the sum or sums of Federal funds paid to the highway agency under the terms of this agreement.

5. INTERSTATE SYSTEM PROJECT.
a. The State highway agency will not add or permit to be added, without the prior approval of the Federal Highway Administration any points of access to, or exit from, the project in addition to those approved in the plans and specifications for the project.
b. The State highway agency will not permit automotive service stations, or other commercial establishments for serving motor vehicle users, to be constructed or located on the right-of-way of the interstate system.
c. The State highway agency will not after June 30, 1968, permit the construction of any portion of the Interstate Route on which this project is located, including spurs and loops, as a toll road without the written concurrence of the Secretary of Transportation or his officially designated representative. The term 'toll road' does not include toll bridges or toll tunnels.

6. PROJECT FOR CONSTRUCTION IN ADVANCE OF APPORTIONMENT.
a. This project authorized pursuant to 23 U.S.C. 115 as amended, will be subject to all procedures and requirements, and conform to the standards applicable to projects on the system on which located, financed with the aid of Federal funds.
b. No present or immediate obligation of Federal funds is created by this agreement, its purpose and intent being to provide that, upon application by the State highway agency, and approval thereof by the Federal Highway Administration, any Federal-aid funds of the class designated by the project number prefix, apportioned or allocated to the State under 23 U.S.C. 103(e)(4), 104, or 144 subsequent to the date of this agreement, may be used to reimburse the State for the Federal share of the cost of work done on the project.

7. STAGE CONSTRUCTION. The State highway agency agrees that all stages of construction necessary to provide the initially planned complete facility, within the limits of this project, will conform to at least the minimum values set by approved AASHTO design standards applicable to this class of highways, even though such additional work is financed without Federal-aid participation.

8. BOND ISSUE PROJECT. Construction, inspection and maintenance of the project will be accomplished in the same manner as for regular Federal-aid projects. No present or immediate obligation is created by this Agreement against Federal funds, its purpose and intent being to provide aid to the State, as authorized by 23 U.S.C. 122, for retiring maturities of the principal indebtedness of the bonds referred to below. When the State requests Federal reimbursement to aid in the retirement of such bonds, the request will be supported by the appropriate certification required by 23 CFR Part 140, Subpart F, and Volume 1, Chapter 4, Section 8 of the Federal-Aid Highway Program Manual, and payment of the authorized Federal share will be made from appropriate funds available. If in any year there is no obligated balance of any apportioned Federal funds available from which payments hereunder may be made, there will be no obligation on the part of the Federal Government on account of bond maturities for that year. Funds available to the highway agency for this project are the proceeds of bonds issued by the governmental unit indicated on the attached tabulation, pursuant to the authority and in the amounts by date of issue and beginning date of maturities set forth therein.

9. SPECIAL HIGHWAY PLANNING AND RESEARCH PROJECT. The State highway agency hereby authorizes the Federal Highway Administration to charge the State's pro rata share of costs incurred against funds apportioned to the State under 23 U.S.C. 307 (c), as amended. In the event a project is financed with both Federal-aid funds and State matching funds, the State agrees to advance to The Federal Highway Administration the State matching funds for its share of the estimated cost. For a National Pooled Fund study, the State hereby assigns its responsibility for the work to the Federal Highway Administration. For an Intra-Regional Cooperative Study, the State hereby assigns its responsibility for the work to the lead State for the study.

10. PARKING REGULATION AND TRAFFIC CONTROL. The State highway agency will not permit any changes to be made in the provisions for parking regulations and traffic control as contained in the agreement between the State and the local unit of Government referred to in the paragraph on "Additional Provisions," without the prior approval of the Federal Highway Administration, unless the State determines, and the Division Administrator concurs, that the local unit of Government has a functioning traffic engineering unit with the demonstrated ability to apply and maintain sound traffic operations and control.

AGREEMENT PROVISIONS (Continued)

11. SIGNING AND MARKING. The State highway agency will not install, or permit to be installed, any signs, signals, or markings not in conformance with the standards approved by the Federal Highway Administrator pursuant to 23 U.S.C. 109(d) or the State's Certificate as applicable.

12. MAINTENANCE. The State highway agency will maintain, or by formal agreement with appropriate officials of a county or municipal government cause to be maintained, the project covered by this agreement.

13. LIQUIDATED DAMAGES. The State highway agency agrees that on Federal-aid highway construction projects not under Certification Acceptance the provisions of 23 CFR Part 630, Subpart C and Volume 6, Chapter 3, Section 1 of the Federal-Aid Highway Program Manual, as supplemented, relative to the basis of Federal participation in the project cost shall be applicable in the event the contractor fails to complete the contract within the contract time.

14. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT (APPLICABLE TO CONTRACTS AND SUBCONTRACTS WHICH EXCEED $100,000).

a. The State highway agency stipulates that any facility to be utilized in performance under or to benefit from this agreement is not listed on the Environmental Protection Agency (EPA) List of Violating Facilities issued pursuant to the requirements of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended.

b. The State highway agency agrees to comply with all of the requirements of section 114 of the Clean Air Act and section 308 of the Federal Water Pollution Control Act, and all regulations and guidelines issued thereunder.

c. The State highway agency stipulates that as a condition of Federal aid pursuant to this agreement it shall notify the Federal Highway Administration of the receipt of any advice indicating that a facility to be utilized in performance under or to benefit from this agreement is under consideration to be listed on the EPA List of Violating Facilities.

d. The State highway department agrees that it will include or cause to be included in any Federal-aid to highways agreement with a political subdivision of the State which exceeds $100,000 the criteria and requirements in these subparagraphs a. through d.

15. EQUAL OPPORTUNITY. The State highway agency hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the rules and regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance or guarantee, the following equal opportunity clause:

"During the performance of this contract, the contractor agrees as follows:

a. The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoffs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the State highway agency setting forth the provisions of this nondiscrimination clause.

b. The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

c. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the State highway agency advising the said labor union or workers' representative of the contractor's commitments under Section 202 of the Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

d. The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

e. The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records and accounts by the Federal Highway Administration and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

f. In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or Federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

g. The contractor will include the provisions of Section 202 of Executive Order 11246 of September 24, 1965, in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the State highway agency or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance; *Provided, however,* that in the event a contractor becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction by the Administration, the contractor may request the United States to enter in such litigation to protect the interests of the United States."

The State highway agency further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, that if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

AGREEMENT PROVISIONS (Continued)

The State highway agency also agrees:
(1) To assist and cooperate actively with the Federal Highway Administration and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor.
(2) To furnish the Federal Highway Administration and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the Federal Highway Administration in the discharge of its primary responsibility for securing compliance.
(3) To refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order.
(4) To carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the Federal Highway Administration or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order.
In addition, the State highway agency agrees that if it fails or refuses to comply with these undertakings, the Federal Highway Administration may take any or all of the following actions:
(a) Cancel, terminate, or suspend this agreement in whole or in part;
(b) Refrain from extending any further assistance to the State highway agency under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from the State highway agency; and
(c) Refer the case to the Department of Justice for appropriate legal proceedings.

16. NONDISCRIMINATION. The State highway agency (SHA) hereby agrees that it will comply with Title VI of the 1964 Civil Rights Act and related statutes and implementing regulations to the end that no person shall on the grounds of race, color, national origin, handicap, age, sex, or religion be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the project covered by this agreement and, further, the SHA agrees that:
a. It will insert the nondiscrimination notice required by the Standard Department of Transportation (DOT) Title VI Assurance (DOT Order 1050.2) in all solicitations for bids for work or material, and, in adapted form, in all proposals for negotiated agreements.
b. It will insert the clauses in Appendixes A, B, or C of DOT Order 1050.2, as appropriate, in all contracts, deeds transferring real property, structures, or improvements thereon or interest therein (as a covenant running with the land) and in future deeds, leases, permits, licenses, and similar agreements, related to this project, entered into by the SHA with other parties.
c. It will comply with, and cooperate with, FHWA in ensuring compliance with the terms of the standard Title VI Assurance, the act and related statutes, and implementing regulations.

17. MINORITY BUSINESS ENTERPRISES (MBE's)
a. The State highway agency hereby agrees to the following statements and agrees that these statements shall be included in all subsequent agreements between the recipient and any subrecipient and in all subsequent DOT-assisted contracts between recipients or subrecipients and any contractor:
(1) "Policy. It is the policy of the Department of Transportation that minority business enterprises (MBE's), as they are defined in 49 CFR Part 23 [for the purposes of 49 CFR Part 23, Subpart D, MBE's refer to disadvantaged business enterprises (DBE's); for the purposes of other subparts of Part 23, MBE's include women's business enterprises (WBE's)], shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently, all applicable requirements of 49 CFR Part 23 apply to this agreement.
(2) "Obligation. The recipient or its contractor agrees to ensure that MBE's, as defined in 49 CFR Part 23, have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard, all recipients or contractors shall take all necessary and reasonable steps in accordance with the applicable section of 49 CFR Part 23 to ensure that MBE's have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, handicap, religion, age, or sex, as provided in Federal and State law, in the award and performance of DOT-assisted contracts."
b. If, as a condition of assistance, the recipient has submitted and the Department has approved an MBE affirmative action program which the recipient agrees to carry out, this program is incorporated into this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the recipient of its failure to carry out the approved program, the Department shall impose such sanctions as are noted in 49 CFR Part 23, Subparts D or E, which sanctions may include termination of the agreement or other measures that may affect the ability of the recipient to obtain future DOT financial assistance.

18. BICYCLE TRANSPORTATION AND PEDESTRIAN WALKWAYS. No motorized vehicles shall be permitted on bikeways or walkways authorized under this project except for maintenance purposes and, when snow conditions and State or local regulations permit, snowmobiles.

19. MODIFIED OR TERMINATED HIGHWAY PROJECTS. For certain projects described in 23 CFR Part 480 or as prescribed in other parts of Title 23, Code of Federal Regulations, the payback provisions found in these parts shall supersede provisions 3 and 4 of this agreement.

20. ENVIRONMENTAL IMPACT MITIGATION FEATURES. The State highway agency shall ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental documents unless the State requests and receives written Federal Highway Administration approval to modify or delete such mitigation features.

CERTIFICATION ACCEPTANCE FINAL INSPECTION REPORT

81-0010

FHWA REGION	CITY	COUNTY	DIVISION
4	—	— Regional	Tennessee

IN COMPANY WITH	CONTRACT #
MR. S. BLUNT - TDOT	6523

DATE OF INSPECTION	INSPECTION MADE BY	PROJECT NO.
11/3/87 & 11/18/87	T.H. SELLERS	RAD-0005 (347)

WORK TYPE/LOCATION
SIGNS & PAVEMENT MARKINGS AT 196 OFF-SYSTEM RAILROAD CROSSINGS IN TDOT REGION 4

SATISFACTORY ☑ UNSATISFACTORY ☐

By copy of this report it is requested that Form FHWA-1446C be submitted for our completion so the project can be closed.

AREA ENGINEER

Eff. date 2/3/87 F-INSPEC Disk#1 J/Permanent

PROGRAMMING DIVISION - FEDERAL-AID LIAISON

FEDERAL-AID PROJECT RECORD

F.A. PROJECT NO. RRO-000S(347) 5-330 STATE PROJECT NO. 98040-3654-94 ✓

ITEM NUMBER CP-236

PROGRAM APPROVED 4-2-87 @ 99 % F.A. FUNDS

SUB. TO BPR PROJ. AUTHORIZED LENGTH 0.00

COUNTY Regionwide

TERMINI 196 Off-System R/R Crossings in Chester, Crockett, Fayette, Gibson, Hardin. ~~Hardeman, Haywood, Lauderdale, McNairy, Tipton, and Weakley Counties~~

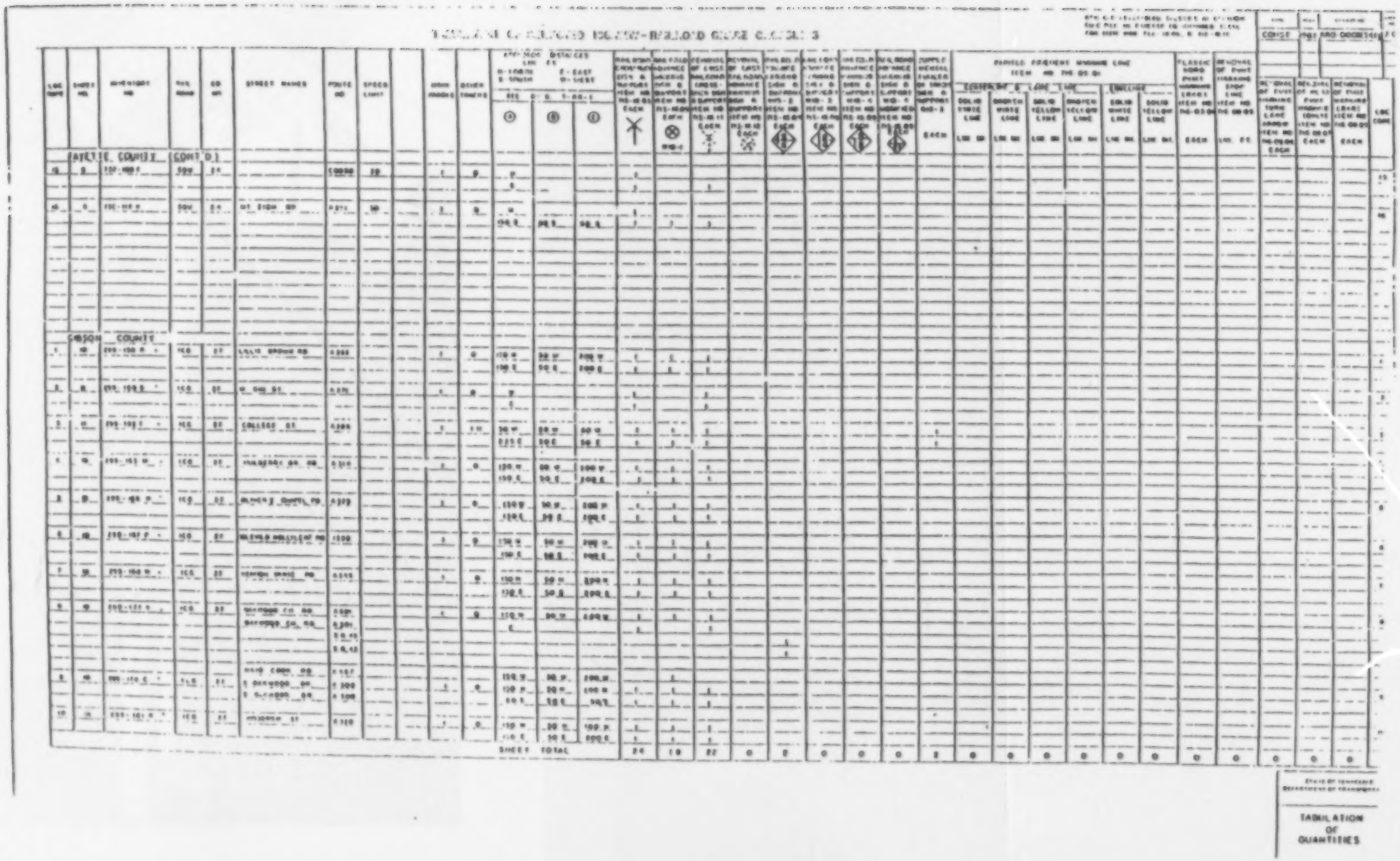
TYPE OF WORK Installations of Minimum Protection

CONTRACTOR C & O Safety Company, Incorporated CONTRACT NUMBER 6533

LETTING DATE 5-1-87 WORK BEGAN 6-8-87 WORK FINISHED 11-18-87

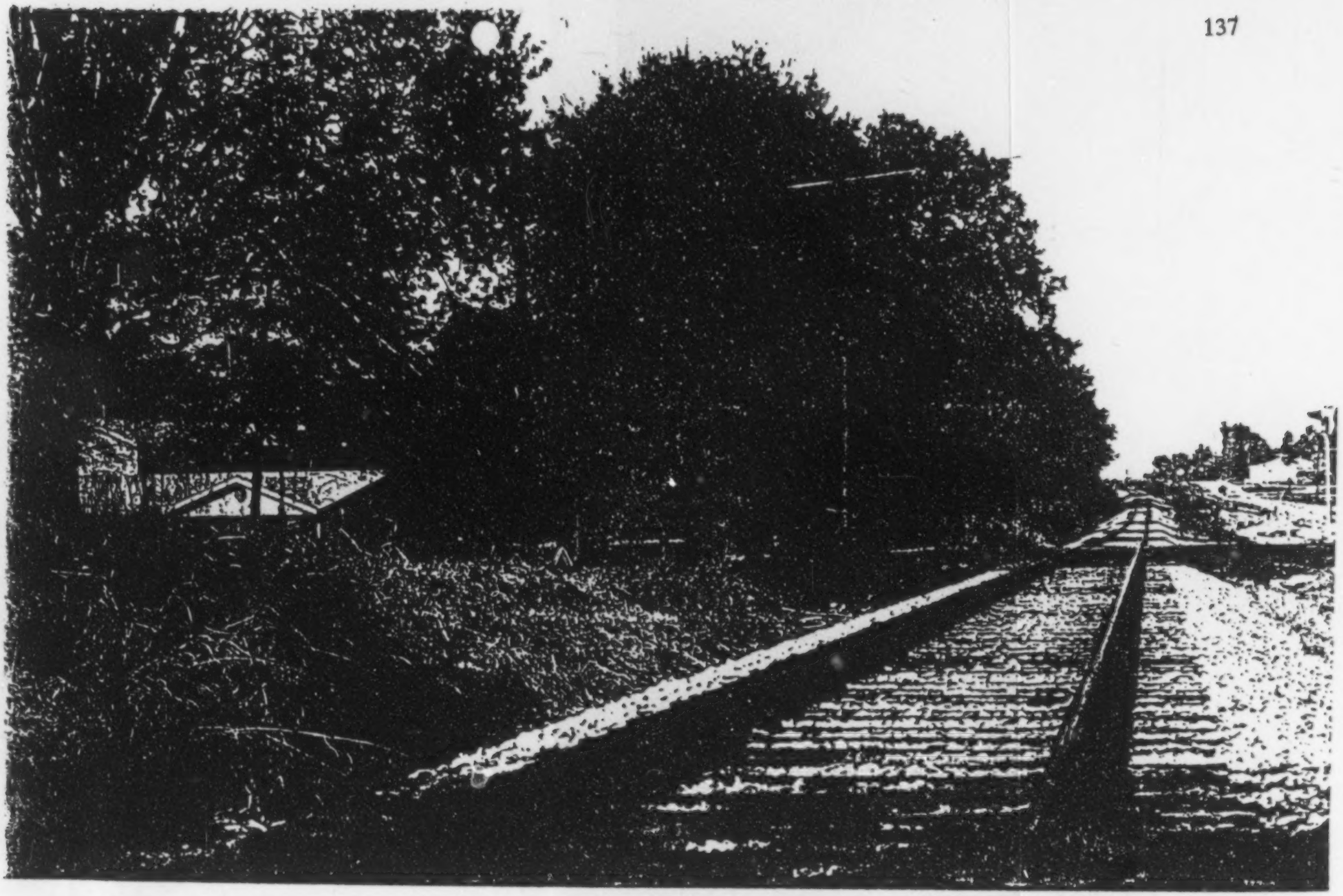
		EXECUTED DATE	F.A., $	NON-F.A., $
PR-2,	$ 130,147.00 + 1,624.00	6-2-87	128,848.00 + 1,607.00	
PR-2A,	131,773.00	7-31-89	130,455.00	
"		"	"	"
"	-614.00	"	- 608.00	"
FINAL VOUCHER	131,159.00	"	129,847.00	PAID 12-11-89

133



TABULATION OF QUANTITIES

RAIL ROAD
CROSSING



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

FINAL INSPECTION OF FEDERAL AID PROJECT
CONSTRUCTED UNDER 23 U.S.C. 117

#6533
84-1155

INSTRUCTIONS: State is to complete items 1, 2, 3, and submit original and three (3) copies to the Federal Highway Administration Division Office.

1. PROJECT NO.	2. COUNTY	3. STATE
RRO-0005 (347)	Regionwide	TENNESSEE

4. DESCRIPTION OF IMPROVEMENT AS PROGRAMED

196 Off-System Railroad Crossings in Chester, Crockett, Fayette, Gibson, Hardeman, Hardin, Haywood, Lauderdale, McNairy, Tipton and Weakley Counties.

Installation of Minimum Protection

5. CONTRACTOR'S NAME	6. CONTRACT AMOUNT
L & D Safety Company	$ 118,316.80

7. NOTICE OF COMPLETION: The above listed project has been completed and is ready for final inspection.

SIGNATURE (SHA OFFICIAL) Peter Falkenberg

TITLE Certification Acceptance Engineer

8. FEDERAL HIGHWAY ADMINISTRATION INSPECTION MADE BY	9. DATE OF INSPECTION
T.H. SELLERS	11/3/87 & 11/18/87

10. IN COMPANY WITH
MR. S. PERRY - TDOT

11. REMARKS

12. SIGNATURE	13. TITLE	14. DATE
	ADM ENG	4/25/88

Form FHWA-1446Q
(Rev. 2-78)

139

BEST AVAILABLE COPY

DEC 16 1999

(4)

No. 99-312

Supreme Court, U.S.
FILED
DEC 16 1999
CLERK

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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December 16, 1999

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

62pp

QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), when it held that claims of negligence based on inadequate warning devices at a railway grade crossing are not preempted even though the warning devices at the crossing were installed with federal funds under a project approved by the federal government.

LIST OF PARTIES AND AFFILIATES

CONSOLIDATED (MORE THAN 50% OWNED) SUBSIDIARIES OF NORFOLK SOUTHERN CORPORATION

Agency Media Services, Inc.
Atlantic Acquisition Corporation
Atlantic Investment Company
Norfolk Southern Properties, Inc.
Norfolk Southern Railway Company
Northern Horizons Insurance Company
Northmont Limited Partnership
NS Crown Services, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
TCS Leasing, Inc.
Thoroughbred Direct Intermodal Services, Inc.
Thoroughbred Technology and Telecommunications, Inc.
Triple Crown Services Company

Norfolk Southern Railway Company Subsidiaries

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Alabama Great Southern LLC
Atlantic and East Carolina Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Chesapeake Western Railway
Cincinnati, New Orleans and Texas Pacific Railway Company, The
Citico Realty Company
Georgia Southern and Florida Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company

Lamberts Point Barge Company, Inc.
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern International, Inc.
North Carolina Midland Railroad Company, The
Rail Investment Company
Shenandoah-Virginia Corporation
South Western Rail Road Company, The
Southern Rail Terminals, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Region Coal Transport, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Norfolk Southern Properties, Inc. Subsidiaries

Alexandria-Southern Properties, Inc.
Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
Carlyle CA Corporation
Carlyle Development Corporation
Charlotte-Southern Corporation
Charlotte-Southern Hotel Corporation
Lambert's Point Docks, Incorporated
NKPI Management, Inc.
Nickel Plate Improvement Company, Inc., The
Norfolk Southern Industrial Development Corp.
Norfolk Southern Tower, L.L.C.
NS-Charlotte Tower Corporation
NS Gas Properties, Inc.
NS Gas Properties, II, Inc.

Sandusky Dock Corporation
Southern Region Industrial Realty, Inc.
Virginia Holding Corporation

In addition, NS also owns direct or indirect equity interest in:

Conrail Inc.
Consolidated Rail Corporation and its consolidated subsidiaries
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Green Acquisition Corp.
New York Central Lines LLC
Pennsylvania Lines LLC and its subsidiaries.

Affiliated Companies (50% or Less Owned) or Partnerships

Ace Insurance Company
Algers, Winslow and Western Railway Company
Amtech Logistics Corporation
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Belt Railway Company of Chicago, The
CK-Southern Associates
CK-Southern Associates #2 L.P.
CK-Southern Associates #3, L.L.C.
CNS Limited Partnership
Carlyle Towers, L.L.C.
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chesapeake Crossing Seniors Community One, L.P.
Chesapeake Crossing Seniors Community Two, L.P.
Fiberow Partnership
1575 Eye Street Associates (Limited Partnership)

Florida East Coast Industries, Inc.
Gateway Institutional Tax Credit Fund Ltd.
Gilbert NS Lumber, LLC
Gilbert-PLC Lumber Co.
Gilbert Pocahontas, L.L.C.
Glenwood Square Shopping Center Associates, L.L.C.
Green Real Estate Company
High Point, Thomasville & Denton Railroad Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Martiki-Pocahontas Partnership
Midland Corporate Tax Credit Ltd.
North Charleston Terminal Company
Pace Carbon Synfuels Investors, L.P.
Peoria and Pekin Union Railway Company
Pine Brook Center Limited Partnership
Railbox Company
Railgon Company
700 North Fairfax Street Limited Partnership
Southeast Banking Corporation
Stonebridge Manor Apartments, L.P.
TTX Company
Terminal Railroad Association of St. Louis
Three Commercial Place Associates
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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IN THE

Supreme Court of the United States

No. 99-312

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 173 F.3d 386 (Appendix to Petition for Certiorari ("Pet. App.") 1a). The opinion and order of the United States District Court for the Western District of Tennessee denying summary judgment to petitioner is unreported (Pet. App. 26a).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1999. A timely petition for rehearing was denied by the court of appeals on May 24, 1999. A timely petition for certiorari was filed in this Court on August 20, 1999, and was granted on October 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e) and 130 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) (Pet. App. 40a-45a). The regulation at issue is 23 C.F.R. § 646.214 (Pet. App. 46a).

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court unanimously held that federal regulations that prescribe rules for designing "[a]dequate warning devices" installed with federal funds at railway-highway crossings, 23 C.F.R. § 646.214 (emphasis omitted), preempt state tort law claims against railroads alleging the inadequacy of those devices. In the years following, the majority of courts of appeals and state supreme courts have been faithful to *Easterwood*, and have adopted a bright-line rule that inadequate-device tort claims are preempted where federal funds participated in the installation of the allegedly inadequate warning devices under a project approved by the Federal Highway Administration ("FHWA").[1] The court of appeals for the Sixth Circuit in this case, however, refused to give *Easterwood* a "literal reading." Pet. App. 11a-12a (quoting *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307 (7th Cir. 1994)). In-

[1] *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 864-65 (11th Cir. 1998); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Hatfield* v. *Burlington N. R.R. Co.*, 64 F.3d 559, 562 (10th Cir. 1995); *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 922 (8th Cir. 1999), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538); *Bryan* v. *Norfolk & W. Ry. Co.*, 154 F.3d 899, 903 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 921 (1999); *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241, 244-45 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

stead, it has engrafted onto *Easterwood* an additional, unfounded prerequisite to preemption: *viz.*, specific evidence must be presented that the FHWA examined the conditions of a particular crossing and made an independent, site-specific determination as to whether the state agency has selected the proper warning device. See Pet. App. 13a, 22a. The court of appeals decision is contrary not only to *Easterwood* but also to the federal statutory and regulatory scheme as a whole, and should be reversed.

A. Historical, Statutory, And Regulatory Background.

1. *Historical Evolution Of Railroad Crossings.*

The issue of railway-highway crossing safety has evolved substantially since railroads first appeared in the United States in the 1830's. During the rapid expansion of railroads in the nineteenth century,[2] communities competed for railroad service, and allowed railroads to build their tracks across existing streets and roads at "grade" to save on capital costs. *1972 Crossings Report (Part I)* at A-3; cf. Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* 2 (1972) (*"1972 Crossings Report (Part II)"*) (defining a "public grade crossing" as an intersection of a railway and a public road at the same level). Crossing safety was not a significant concern; trains were few in number and moved slowly, as did highway travelers, who were usually

[2] *See* Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* A3-A5 (1972) (*"1972 Crossings Report (Part I)"*); Federal Highway Administration, U.S. Dep't of Transportation, *Railroad-Highway Crossing Handbook* 1-2 (2d ed. 1986) (*"Crossing Handbook"*).

on foot, horseback, horse-drawn vehicles, or bicycles. *Crossing Handbook* at 2; *1972 Crossings Report (Part I)* at A4. During this period, state tort law came to recognize a duty of railroads to maintain crossing safety and ensure adequate warning to travelers of the possible approach of a train. See, *e.g.*, *id.*; *Continental Improvement Co.* v. *Stead*, 95 U.S. 161, 165 (1877).

With the advent of the automobile and the rapid growth of public roads, crossing accidents grew more frequent and severe; approximately 2,000 fatal accidents occurred every year in the decade of the 1920's. *Crossing Handbook* at 5, 15. Despite increased state, federal, and railroad expenditures on crossing safety, *id.* at 5; *1972 Crossings Report (Part I)* at A5, accidents persisted at unacceptably high levels throughout the middle part of this century even as railroad line mileage declined. *Crossing Handbook* at 2, 5 (annual fatalities between 1930 and 1970 ranged from 1200 to 2000); *1972 Crossings Report (Part II)* at 5; Federal Highway Administration, U.S. Dep't of Transportation, *Rail-Highway Crossings Study* 1-8 (1989) ("*1989 Crossings Study*"). The principal reason was the explosive growth of motor vehicle miles traveled, which dramatically increased the risks of crossing accidents. See *1972 Crossings Report (Part II)* at 5 (noting 25-fold increase in motor vehicle miles traveled between 1920 and 1970); *1989 Crossings Study*, at 1-5 (noting 12-fold increase in the exposure index (*i.e.*, combined railroad and highway traffic), the best measure of accident risk, during that same period); *Crossing Handbook* at 2-3.

Although this change was largely ignored by state tort law, federal and state officials grappling with crossing safety gradually came to recognize that motor vehicles had become the primary source of the hazard, and railroads should no longer bear the primary responsibility for

maintaining the safety of railway-highway crossings. In a landmark decision reflecting this shift in attitude, *Nashville, Chattanooga, and St. Louis Railway* v. *Walters*, 294 U.S. 405 (1935), this Court vacated and remanded a case for consideration of whether Tennessee's system of requiring railroads to pay 50 percent of the expense of grade separations at railway-highway crossings violated the Due Process Clause, explaining: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which requires protection from the dangers incident to motor transportation." *Id.* at 422-23 (footnote omitted); see also *1972 Crossings Report (Part I)* at A14 (detailing actions of States to reduce financial burdens on railroads in state crossing-safety programs); S. Rep. No. 74-1976, at 10-13 (1936) (agreeing with *Walters* in justifying use of federal funds to improve crossing safety). Similarly, the Interstate Commerce Commission in 1964 urged greater public funding for crossing safety, remarking that

> [i]n the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.

Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, 322 I.C.C. 1, 82 (1964); see *id.* at 87.

2. *Federal Intervention To Reduce Railroad Crossing Hazards.*

Recognizing the dangers posed by rapidly increasing automobile travel and the need for the public to take greater responsibility for crossing safety, Congress has from the inception of the federal-aid highway program

authorized States to use federal funds to improve those crossings. See Act of July 11, 1916, ch. 241, 39 Stat. 355; *1989 Crossings Study* at 1-7, 1-8; *Crossing Handbook* at 8; *Walters*, 294 U.S. at 419-21. In 1944, Congress expanded such authorizations to permit States to use up to 10% of their allotment of federal highway funds for crossing improvements. *1972 Crossings Report (Part II)* at 25.

Congress has always acted to ensure that warning devices are adequate when federal highway funds are involved in a grade-crossing project. Beginning in 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden the expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[3] Congress has more generally provided that the Secretary of Transportation "shall ensure that the plans and specifications for each proposed highway project . . . provide for a facility that will . . . *adequately* serve the existing and planned future traffic of the highway in a manner that is conducive to safety, durability, and economy of maintenance," and will "be designed and constructed in accordance with criteria *best suited* to accomplish [those] objectives . . . and to conform to the particular needs of

[3] Under current definitions, enacted in 1991 and modified in 1998, *see* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1201, 1998 U.S.C.C.A.N. (112 Stat.) 107, 164-65 (1998), a "[f]ederal-aid highway" is "a highway eligible for assistance under [Title 23, chapter 1] other than a highway classified as a local road or rural minor collector." 23 U.S.C. § 101(a)(5). Previously, the term was defined to "mean[] highways located on one of the Federal-aid systems described in section 103 of this title." *See* 23 U.S.C.A. § 101(a) (1990).

each locality." *Id.* § 109(a) (emphases added).[4] The Secretary has a further statutory obligation to ensure that any warning signs, pavement markings, and traffic signals installed in any federally funded highway project "will promote the safe and efficient utilization of the highways." *Id.* § 109(d).

3. *The Federal Railroad Safety Act.*

The 1960's brought a sharp spike in crossing fatalities, *1989 Crossings Study* at 1-5, raising the pressure on Congress to increase federal intervention to promote grade crossing safety. Troubled by the statistical trend and other safety issues, and by the inadequacy of haphazard state safety regulation, Congress enacted the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971. See H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109; see also S. Rep. No. 91-619, at 31 (1969) (noting lack of "uniform pattern of involvement" of the States in railway safety, and the "need for

[4] At the time of project approval in this case, section 109(a) read:

> The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

23 U.S.C.A. § 109(a) (1990).

a comprehensive national approach"). The purpose of the FRSA was "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. § 20101.[5] Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Easterwood,* 507 U.S. at 662. In the FRSA's preemption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. In keeping with this strong policy of federalization, Congress only permitted States to "adopt or continue in force any law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.; Easterwood,* 507 U.S. at 662; H. Rep. No. 91-1194, at 19 (emphasizing congressional intent to forbid any "[s]tatewide standards superimposed on national standards covering the same subject matter"), *reprinted in* 1970 U.S.C.C.A.N. at 4117.

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[5] The FRSA was originally codified at 45 U.S.C. §§ 421 to 444. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C CA.N. 818, 818-22. Even though the events in question in this case took place before the 1994 recodification, this brief will use the current Title 49 citations for the FRSA provisions.

4. The 1972 Report Of The Secretary On Railroad Crossings.

In the FRSA and the Highway Safety Act of 1970, Congress expressed special concern about railway crossing safety, and it mandated that the Secretary undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, and to transmit to Congress a comprehensive report on the problem together with his recommendations for appropriate action. See FRSA, § 204, 84 Stat. at 972; Highway Safety Act of 1970, Pub. L. No. 91-605, § 205(a), 84 Stat. 1739, 1742; H.R. Rep. 91-1194, at 18-19, *reprinted in* 1970 U.S.C.C.A.N. at 4116. *Easterwood*, 507 U.S. at 661-62. Pursuant to the Congressional mandate, the Secretary filed a two-part Report. The first part was the Secretary's study of the problem, and the second contained his analysis and recommendations for solution. First, noting that problems of fragmented jurisdiction among state and local authorities and the railroads had hampered making an effective attack on crossing hazards, the Secretary emphasized "[t]he need for national coordination of an issue that affects the Nation's railroad and highway systems." *1972 Crossings Report (Part II)* at iii. The Secretary recommended that states retain their existing authority to select crossing improvements, subject to FHWA oversight, but they "should be strongly encouraged to develop procedures to assure that every crossing in the State will be given equal consideration for improvement under any grade crossing improvement program." *Id.* at iv. Second, the Secretary recommended a dramatic and refocused expansion of federal funding, driven by cost-benefits analyses to maximize accident reduction. *Id.* at ii. Applying that approach, the Secretary favored upgrades of warning devices over the more expensive alternative of eliminating grade crossings. *Id.* The Secretary

further determined that active warning devices (such as flashers or gates) would be justified at only 30,000 of the nation's then-existing 223,000 public grade crossings. *Id.* at ii, 86-88. Underscoring the benefits to be derived from deployment of passive warning devices, the Secretary urged that states and railroads institute a program for such improvements "[t]o effectively treat . . . lower volume crossings which do not warrant active protection and to provide effective advance warning at all crossings." *Id.* at ii, 92. Finally, observing that crossing dangers were not limited to the traditional Federal-aid highway system, the Secretary called for expansion of federal funding to all public roads in a State. *Id.* at iii, 14, 92.

5. *The Highway Safety Act Of 1973 And Subsequent Legislation.*

Congress responded to the Secretary's Report by enacting section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283, the provisions of which were later incorporated (as revised) in 23 U.S.C. § 130.[6] See *Easterwood*, 507 U.S. at 662-63. The statute specifically authorizes the grant of federal funds to States "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a).[7] To secure funds, States "must survey all highways" to identify crossings in need of safety improvements (including "protective devices"), and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). As this Court stated in *Easterwood*, section 130 and the FHWA's later implementing regulations constitute a "federal effort to encourage the States to rationalize their decisionmaking" on elimination of crossing hazards. 507 U.S. at 667.

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[6] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60. *See* Federal Highway Administration, U.S. Dep't of Transportation, *The 1996 Annual Report on Highway Safety Improvement Programs* I-2 (1996) (*"1996 Annual Report"*).

[7] Although otherwise available funding could also be used to implement the section 130 program, the 1973 Act created a special authorization from the Highway Trust Fund for projects to redress crossing hazards on the federal-aid highway system. Pub. L. No. 93-87, § 203(b), (c), 87 Stat. 282, 283. In 1976, after an inventory of the nation's crossings revealed that 77% of the nation's public crossings were off the federal-aid system, *1989 Crossings Study* at I-9, Congress specifically authorized a separate section 203(c) Rail-Highway Crossings Off-System Program to extend federal funding "for the elimination of hazards of railway-highway crossings on roads other than those on any Federal-aid system." Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, § 203(c), 90 Stat. 425, 452. In creating the new Off-System Program, Congress specifically provided that funding for projects under that program "shall be subject to all of the provisions of chapter 1 of title 23, United States Code, applicable to highways on the Federal-aid system." *Id.* Thus, for all crossing projects, the Secretary of Transportation had to ensure that the plans and specifications provided for the design and construction of facilities according to standards best suited to ensure adequate safety, 23 U.S.C. § 109(a), that all federally funded warning signs and traffic signals would "promote the safe and efficient utilization of the highways," *id.* § 109(d), and, more specifically, that all "safety protective devices" at grade crossings complied with the Secretary's adequacy standards, *id.* § 109(e).

In 1978, Congress was concerned that "about one-half of the 170,000 grade crossings off the Federal aid-system ha[d] inadequate warning devices" and sought to "bring warning devices at off-system crossings up to acceptable levels." H.R. Rep. No. 95-1485, at 44 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6575, 6620. It accordingly consolidated the On-System and Off-System programs into a single program, repealing § 203(c). Highway Safety Act of 1978, Pub. L. No. 95-599, § 203, 92 Stat. 2727, 2728; H.R. Conf. Rep. No. 95-1797, at 117 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6693, 6731. This gave the States and the FHWA the necessary flexibility to apply the full amount of federal crossing funds as public need dictated, without regard to the location of the crossing. The FHWA continues to operate a single Railway Crossings Program. *See* 23 U.S.C. § 133(d)(1); *1996 Annual Report* at I-1 to I-2.

In keeping with the recommendations in the 1972 Report, Congress further required that "[a]t a minimum, such a schedule shall provide for signs for all railway-highway crossings," 23 U.S.C. § 130(d), and that "[a]t least ½ of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings," rather than for crossing separations or relocations, *id.* § 130(e). Recognizing that railroads do not usually gain economically from the installation of protective devices, because the cost of installation and maintenance exceeds the expected cost of tort liability at any particular crossing, see *1972 Crossings Report (Part II)* at 104-05, Congress forbade railroads to be charged for crossing hazard projects unless the Secretary of Transportation determined that the project resulted in a net benefit for the railroad, and, in any event, capped any such charge at 10% of project costs. 23 U.S.C. § 130(b). The Secretary has confirmed that crossing improvements are of no ascertainable benefit to railroads, and has forbidden States to force railroads to contribute to the cost of improvement projects. 23 C.F.R. § 646.210(a), (b)(1).

Finally, in section 130, Congress mandated close federal oversight of the States' crossing programs. Under subsection (g),

> [e]ach State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of various treatments employed and subsequent accident experience.

23 U.S.C. § 130(g). Congress also imposed a requirement on the Secretary in turn to file an annual report

with the relevant House and Senate Committees "on the progress being made by the State[s] in implementing projects to improve railway-highway crossings." *Id.* Congress mandated that in such reports the Secretary "shall analyze and evaluate each State program [and] identify any State found not to be in compliance with the schedule of improvements required by subsection (d)." *Id.* Thus, the statutory regime requires intimate involvement of the FHWA in the development and revision of State grade-crossing programs to ensure the elimination of crossing hazards.

In enacting the Section 130 crossing program, Congress thus embraced a system in which the selection of warning devices at crossings would be based on expert, technical determinations and extensive data analyses, in contrast to the vagaries of a retrospective tort law system which promotes remediation in response to accidents that occur, whether or not they are reflective of actual future risk. Importantly, to ensure that expert crossing evaluations are not impeded by concerns over future litigation, Congress has acted to prohibit the discovery or admission as evidence in any federal or state court proceeding of

> reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

23 U.S.C. § 409.

6. *FHWA's Regulatory Implementation Of The Section 130 Program.*

Soon after its passage, the FHWA promulgated regulations to implement the 1973 Act.[8] One set of regulations, now codified at 23 C.F.R. pt. 924, governs state highway safety improvement programs (under which States conduct analyses and remediation of railway crossing hazards under 23 U.S.C. § 130). The regulations mandate that "[t]he highway safety improvement program in each State shall consist of components for planning, implementation, and evaluation of safety programs and projects," and that "[t]hese components shall be comprised of processes developed by the States and approved by the Federal Highway Administration." 23 C.F.R. § 924.7. The FHWA has set forth comprehensive specifications for States to develop processes for collecting and maintaining accident, highway, and railway data, *id.* § 924.9(a)(1); for data analysis and engineering studies of crossings, *id.* § 924.9(a)(2)-(3); and for prioritizing, scheduling, and evaluating crossing improvement projects, *id.* §§ 924.9 (a)(4), 924.11, 924.13.

In addition to the general regulations governing state crossing programs, the FHWA made States "subject to further regulations governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666-67. Those regulations, which are directly at issue in this case, are set forth in 23 C.F.R. § 646.214(b), which was promulgated in 1975.[9]

Regulation 646.214(b) has three subsections. Subsection (b)(1) provides that the States "*must employ* devices that conform to standards set out in FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or Manual)." *Easterwood*, 507 U.S. at 667 (emphasis added); 23 C.F.R. § 646.214(b)(1). Although it imposes certain requirements if special conditions are present, the MUTCD imposes only one mandatory requirement for all grade crossings: namely, that on each roadway approach to the crossing, there must be one "crossbuck sign" (*i.e.*, the traditional X-shaped sign with the words RAILROAD CROSSING on crossed panels) placed on the right-hand side, if feasible. Federal Highway Administration, U.S. Dep't of Transportation, *Manual on Uniform Traffic Control Devices for Streets and Highways* 8B-1 (1988) (*"MUTCD"*).

[8] The Secretary delegated his statutory power under the relevant Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

[9] *See* Reimbursement for Railroad Work and Railroad-Highway Projects, 40 Fed. Reg. 16,057, 16,061 (Apr. 9, 1975).

Subsections (b)(2) through (b)(4) cover the subject matter of the adequacy of warning devices at railway crossings in federally funded projects. See *Easterwood*, 507 U.S. at 666, 670-71. Subsection (b)(2) restates the requirements of 23 U.S.C. § 109(e) that, where railway crossings are within or near the terminus of a federal-aid highway project, the crossing shall not be opened for unrestricted use nor the project accepted by FHWA "until adequate warning devices for the crossing are installed and functioning properly." 23 C.F.R. § 646.214(b)(2). Subsections (b)(3) and (b)(4) set forth the rules for determining the adequacy of crossing devices, not only for crossings governed by (b)(2), but for "any project where Federal-aid funds participate in the installation of the devices." *Id.* § 646.214(b)(3)(i).

For high-risk crossings enumerated in subsection (b)(3) —such as crossings with multiple tracks, high speed trains operating in areas of limited visibility, or heavy vehicle or train traffic—the FHWA prescribes that only devices that include "automatic gates with flashing light signals" will

be adequate, unless the FHWA finds otherwise based on diagnostic team recommendations. *Id.* § 646.214(b)(3)(i), (ii). For all other crossings, subsection (b)(4) prescribes that the "type of warning device to be installed . . . is subject to the approval of FHWA." *Id.* § 646.214(b)(4). See *Easterwood*, 507 U.S. at 666-67.

To facilitate its program oversight, FHWA has developed procedures for approval of federal-aid projects (such as the federally funded installation of warning devices), which are set forth in 23 C.F.R. pt. 630. Cf. 23 C.F.R. § 646.216(a) (general procedures for federal-aid projects apply to railway crossing projects "[u]nless specifically modified herein"). Those regulations prescribe that "[a]uthorization can be given only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied." *Id.* § 630.106(a). Among the legal requirements that must be satisfied are "standards as prescribed by 23 U.S.C. 109." *Id.* § 630.114(b) (1988).[10] For every project, the State must submit "plans, specifications, and estimates (PS&E), and supporting documents," *id.* § 630.201, the contents of which are determined by the FHWA, *id.* § 630.205(a). Those plans and specifications must "describe the location and design features and construction requirements in sufficient detail" for FHWA evaluation. *Id.* § 630.205(b). They are submitted to the FHWA "for approval," *id.* § 630.205(c), and the project shall not be advertised for bid or commenced until the plans "ha[ve] been approved

[10] The regulation here cited, which was in effect at the time of project approval, has now been recodified as 23 C.F.R. § 630.106(a). The reference to section 109 as one of the legal standards to be satisfied was omitted from the new regulation as part of an FHWA effort to reduce verbiage, but the FHWA has made clear that no substantive change was intended. *See* Federal Aid-Project Authorization, 61 Fed. Reg. 35,629, 35,630 (July 8, 1996).

by the FHWA and the [State] has been so notified." *Id.* § 630.205(e). When a project is approved, the State and the FHWA enter into a federal-aid project agreement, which recites that the "State, through its Highway Agency, ha[s] complied, or [is] hereby agreeing to comply, with the applicable terms and conditions set forth in (1) Title 23, U.S. Code, Highways, (2) the Regulations issued pursuant thereto and, (3) the policies and procedures promulgated by the Federal Highway Administrator relative to the above designated project." J.A. 128; 23 C.F.R. § 630.307(a). The standard project agreement further provides that "[t]he State highway agency will not install, or permit to be installed, any signs, signals, or markings not in conformance with the standards approved by the Federal Highway Administrator pursuant to 23 U.S.C. 109(d) or the State's Certificate as applicable." J.A. 130, § 11.

B. Federal And State Implementation Of The Section 130 Program.

The Department of Transportation, the States, and the railroads quickly set about realizing Congress's vision of a continuous, systematic, and technically driven approach to eliminating railway crossing hazards. Those entities cooperated to develop the United States DOT/AAR[11] National Rail-Highway Crossing Inventory (maintained by the Federal Railroad Administration ("FRA")), in which every single railroad crossing was surveyed and relevant operating, physical, and traffic data were re-

[11] AAR stands for the Association of American Railroads, the rail industry's major trade association. AAR's members include the National Railroad Passenger Corporation (Amtrak) and freight railroads that operate 75 percent of the line haul mileage, employ 91 percent of the workers, and account for 93 percent of the freight revenues of all railroads in the United States. *See* Brief of AAR as *Amicus Curiae*.

corded. *Crossing Handbook* at 52-53; U.S. Dep't of Transportation, Update Manual, *National Railroad-Highway Crossing Inventory* B-1 (1976). The Department of Transportation has defined procedures and allocated specific responsibilities to States and the railroads to ensure continuous updating of crossing information. Railroads, for example, are responsible for providing information on the numbers of track, types of warning devices, crossing surface, daily train movements, and train speeds. *Id.* at C-3. State highway agencies are responsible for providing such information as the character of surrounding developments (residential, industrial, commercial), road characteristics, crossing angles, and vehicular and truck traffic counts. *Id.* Systematic updating of the crossing inventory satisfies the State's obligation under section 130 to conduct annual crossing surveys. *Id.* at A-1.

The Department of Transportation also required the States to develop systematic methods for identifying and ranking crossings for accident potential. *Crossing Handbook* at 63. Those hazard rankings are generated by applying sophisticated computer analysis of the various hazard prediction formulae that the States may select to the inventory and accident data that have been gathered. *Id.* at 63-79. The highest-ranking crossings are then selected to be analyzed in the field by diagnostic teams who conduct engineering studies of "the site characteristics, the existing traffic control system, and the highway and railroad operational characteristics." *Id.* at 79. In its supervisory capacity over Section 130 programs, the FHWA has provided extensive guidance to the States on the conduct of engineering studies and the identification of remediation measures. See *id.* at 79-203.

This technically driven approach to crossing hazards, which requires expert engineering determinations of cost-effective safety measures based on continuously updated data and scientific formulae for predicting accidents, has

been a resounding success. Federal funds have accounted for most of the $3 billion expended on grade crossing safety involving nearly 30,000 projects between 1974 and 1995. Federal Highway Administration, U.S. Dep't of Transportation, *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Frederico Pena* 3 (Mar. 1, 1996) <http://www.fhwa.dot.gov/omc/contents.htm> ("*1996 Task Force Report*"). Despite increased highway and rail traffic, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: there were more than 12,000 accidents and 1,500 fatalities at railway crossings in 1972, but only 3,508 accidents and 431 fatalities in 1998. *Id.* at 2; Federal Railroad Administration, U.S. Dep't of Transportation, *Railroad Safety Statistics Annual Report 1998* 7-7 (1999) (Table 7-2) ("*1998 Safety Report*"). The FHWA has "estimated that since its inception, the Section 130 Program has helped save almost 9,000 lives and prevent nearly 40,000 injuries." *1996 Task Force Report* at 3.

C. The Tennessee Crossing Program Under The Highway Safety Act.

The Tennessee Department of Transportation ("TDOT") instituted a crossing program under 23 U.S.C. § 130(d) to survey the more than 3,400 public grade crossings in the State and, using sophisticated computer modeling that evaluates data at every crossing, to rank those crossings in terms of relative hazard. J.A. 99-100. A diagnostic team of highway engineers is assembled to go to priority crossings and evaluate what warning devices (active or passive) are appropriate. *Id.* at 100-01.

Tennessee has also implemented what it has designated as its "minimum protection program," J.A. 102, even though it goes well beyond the federal MUTCD minimum

of two crossbucks, one on each approach to a crossing. Cf. *MUTCD* at 8B-1. Tennessee has mandated there will be "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would take it." J.A. 102-03.[12]

In 1987, TDOT surveyed 196 crossings in West Tennessee as part of this program, and sought federal funding to install any devices necessary to bring those crossings into compliance with the aforementioned state standard. On April 2, 1987, the FHWA Division Administrator for Tennessee authorized the project to proceed, and on June 2 of that year TDOT entered into a project agreement with the FHWA to spend $128,848 of federal funds on those crossings (which represented 99% of the project cost). J.A. 128.

One such crossing was the Oakwood Church Road crossing in rural Gibson County, where TDOT's contractor removed existing crossbucks and installed reflectorized crossbucks and three advanced warning signs on the approach roads. J.A. 103-04, 128. The placement of the three signs and crossbucks at the Oakwood Church Road crossing shows that, despite the numerous crossings in the federally funded project, due attention was given by the governmental authorities to the upgrade needs of each individual crossing.[13] An FHWA engineer inspected

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12 The Tennessee minimum protection program in effect uses the full panoply of passive warning devices, other than those that are used or permitted only in the presence of special conditions. *See 1989 Crossings Study* at 4-2 to 4-4.

13 By operation of 23 U.S.C. § 409, there is no discoverable or admissible evidence of what data or documentation was submitted in support of TDOT's 1987 application for federal funds. Furthermore, although it is possible to identify Oakwood Church Road as one of the crossings at which warning devices were installed in this project, section 409 bars discovery of its rank in the Tennessee

the project by visiting a sample of the crossings over a two-day period in November 1987,[14] and certified the project's completion. *Id.* at 139, 132. On December 11, 1989, the FHWA paid its 99% share of the project cost to TDOT. *Id.* at 133. Thus, federal funds paid for the installation of warning devices at the Oakwood Church Road crossing in Gibson County, Tennessee.

D. This Litigation.

On October 3, 1993, Eddie Shanklin was killed in a train collision at the Oakwood Church Road crossing as he was driving to work from his home nearby. Respondent Dedra Shanklin, his widow, brought a wrongful death action under Tennessee statutory and common law against petitioner. She alleged various bases of tort liability, including that petitioner was negligent in failing to install adequate warning devices at the crossing. See Pet. App. 2a.

A principal issue both at trial and on appeal was whether, under this Court's decision in *Easterwood*, the FRSA preempted respondent's inadequate-device state tort law claim. In *Easterwood*, this Court declared that the federal regulations defining "adequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) do "cover[] the subject matter of," 49 U.S.C. § 20106, state tort law requiring due care in the selection of warning devices. 507 U.S. at 670.[15] Those regulations, this Court held,

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crossing-hazard index, or of any possible analysis of the crossing by a TDOT diagnostic team. *See* J.A. 101-02 (refusal of TDOT official to divulge that information).

14 There is no record of whether the installations at the Oakwood Church Road crossing were inspected. J.A. 126. The TDOT employee who accompanied the FHWA official could not recall inspecting that crossing. *Id.* at 115.

15 FRSA preemption applies to any rule, regulation, or standard issued by the Secretary of Transportation that relates to railroad

"displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Id.* Thus, inadequate-device tort claims against railroads under state law are preempted whenever "federal funds participate in the installation of warning devices," because in that situation the federal-law requirements imposed in 646.214(b) are applicable. *Id.* at 671.

Even though the Oakwood Church Road crossing's warning devices were federally funded, the district court denied petitioner's preemption defense on summary judgment. Pet. App. 26a. Moreover, the district court instructed the jury that petitioner's duty to exercise reasonable care in warning motorists of an oncoming train "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." J.A. 55. The jury found negligence on the part of both petitioner and the deceased, and assessed damages at $615,379. Because the jury assigned 70% of the negligence to petitioner, judgment was entered against petitioner for $430,765.30.

On appeal, the Sixth Circuit affirmed. It explicitly rejected the rule that "federal funding is both a necessary and a sufficient condition for the preemption of state law" under *Easterwood*. Pet. App. 9a. Instead, it adopted a two-part test for *Easterwood* preemption: (1) whether federal funds participated in the installation of the devices in question, and (2) whether FHWA "actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to

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safety, and not just those issued under the authority of the FRSA. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993). As this Court noted in *Easterwood*, however, 23 C.F.R. § 646.214 (b)(3) and (4) were promulgated in part under the FRSA. *Id.*

(b)(4)." *Id.* at 13a (citing *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307-09 (7th Cir. 1994)).

The Sixth Circuit further rejected the argument that approval of federal funding should be the touchstone of preemption, even though by statute and regulation no funds can be approved unless safety devices comply with FHWA standards, 23 U.S.C. § 109; 23 C.F.R. § 630.106(a); the court reasoned that those provisions do no more than restate the requirements of 23 C.F.R. § 646.214(b)(3) and (4). Pet. App. 19a. Finally, it dismissed the argument that the statutory prohibition on discovery of "reports, surveys, schedules, lists, or data" regarding crossing safety enhancements, 23 U.S.C. § 409, prevented railroads from raising preemption defenses under its approach.

SUMMARY OF ARGUMENT

This Court's unanimous decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), controls this case. In *Easterwood*, this Court held that the FHWA regulation prescribing federal-law requirements for the selection of adequate warning devices at railway crossings covers the subject matter of (and therefore preempts) state common-law duties of a railroad to provide such devices. Because it is the regulation that has preemptive force under the FRSA, this Court held that preemption occurs whenever the regulation is applicable. The FHWA warning-device regulation is applicable whenever federal funds participate in the installation of the devices, and thus under *Easterwood* any state-law claim that a federally funded device is inadequate is preempted.

The Sixth Circuit's decision conflicts with *Easterwood* because it imposes an additional, unjustified prerequisite to preemption: not only must the FHWA regulation be applicable, but the railroad must also submit additional

evidence that the FHWA actually determined the conditions that exist at a particular crossing and whether active or passive devices are adequate for that crossing. Besides its patent conflict with *Easterwood*, the Sixth Circuit's approach is irreconcilable with both FRSA and the FHWA regulation. Even though preemption under FRSA is a straightforward matter of whether the regulation covers the subject matter of state law, the Sixth Circuit has devised a strange and unworkable rule in which preemption does not depend on the coverage of the regulation itself, but on the actions that a local FHWA official takes pursuant to that regulation. Furthermore, the Sixth Circuit wholly misreads the regulation to impose on the FHWA the obligation to make independent assessments of what warning devices are proper for each specific crossing in a project, even though state officials are already required to have made that determination. The text, structure, and history of the FHWA regulation in question make clear that no such duplicative federal determinations are required, and the FHWA may rely on the state highway agency's determinations in ensuring that adequate devices are installed in compliance with federal law. Preemption arises from the regulatory imposition of federal-law rules that require automatic gates at certain high-risk crossings and reserve final authority over device selection to the FHWA; it has nothing to do with the determinations actually made by the FHWA official with responsibility for a project.

Finally, the Sixth Circuit's rule effectively nullifies *Easterwood* preemption because it would be impossible for a railroad to prove such a defense. The evidence of independent FHWA analysis of crossing conditions and warning devices that the Sixth Circuit held to be the *sine qua non* of preemption does not as a general rule exist, and in any event would be barred from discovery or

admission in a court proceeding by operation of federal law designed to protect the integrity of the federal-state crossing program. The Sixth Circuit departed from *Easterwood* based on fundamental misconceptions of this Court's decision and of the statutory and regulatory regime, and its decision should be reversed.

ARGUMENT

I. *EASTERWOOD* MAKES CLEAR THAT INADEQUATE-DEVICE CLAIMS UNDER STATE LAW ARE PREEMPTED WHENEVER THE FEDERAL WARNING-DEVICE REGULATION IS APPLICABLE.

This Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), clearly disposes of this case in petitioner's favor. In *Easterwood*, this Court decided that, whenever federal funds participate in the installation of warning devices at railway crossings, the FHWA regulation on adequacy of the devices governs, and state tort law imposing an independent duty on a railroad to provide adequate warning devices at railway crossings is preempted under the FRSA. *Id.* at 670-71.

The operative statutory provision in *Easterwood* (as here) is the preemption provision of the FRSA. That statute provides that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable," and only permits States to "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. Thus, under the FRSA, preemption flows from the regulation prescribed by the Secretary of Transportation (or his delegatee, such as the FHWA); if the regulation "covering the subject matter of the State requirement" is

applicable, then the state law duty is preempted. See *Easterwood*, 507 U.S. at 665 (FRSA preemption "depends on whether the regulations . . . cover the subject matter of the [state law] allegations").

In *Easterwood*, the railroad petitioner argued that multiple regulations and orders of the Secretary—including not only 23 C.F.R. § 646.214(b) but also the MUTCD and the general federal regulations governing the States' highway safety improvement programs in 23 C.F.R. pt. 924—"cover[ed] the subject matter of" and thus preempted state tort claims of negligence in the selection of warning devices at grade crossings. This Court held that "[l]egal duties imposed on railroads by the common law" were encompassed by the FRSA provision preempting state law requirements related to railroad safety. *Easterwood*, 507 U.S. at 664 (citing *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 522 (1992)). However, the Court gave the statutory preemption clause of the FRSA a "restrictive" reading, *id.*, and refused to accord preemptive effect to the MUTCD or the general Part 924 program regulations. *Id.* at 667-70.

Notwithstanding its restrictive reading of the statute, this Court determined that under FRSA "the provisions of 23 C.F.R. §§ 646.214(b)(3) and (4)" did preempt state common law claims against railroads that warning devices at crossings were inadequate. *Id.* at 670. Subsections (b)(3) and (b)(4) were different from the MUTCD or the program regulations, this Court reasoned, because they "establish requirements as to the installation of particular warning devices." *Id.* Thus, this Court held, "[e]xamination of these regulations demonstrates that, *when they are applicable*, state tort law is pre-empted." *Id.* (emphasis added).

State common law traditionally placed a duty upon railroads to exercise due care in deciding what warning

devices to install at highway crossings. See, *e.g.*, *Grand Trunk Ry. Co.* v. *Ives*, 144 U.S. 408, 416-20 (1892). Subsections (b)(3) and (b)(4), the *Easterwood* Court held, "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained," and "set the terms under which railroads are to participate in the improvement of [their] crossings." 507 U.S. at 670. Subsection (b)(3), by making automatic gates with flashing light signals mandatory at enumerated high-risk crossings, except when the FHWA accepts a diagnostic team's contrary recommendation, see 23 C.F.R. § 646.214(b)(3)(i) and (ii), is a federal law requirement that restricts the railroad's role in device selection at those crossings to "participation in diagnostic teams which may recommend the use or nonuse of crossing gates." *Easterwood*, 507 U.S. at 671.[16]

> Likewise, § 646.214(b)(4), which covers federally funded installations at crossings that do not feature multiple tracks, heavy traffic, or the like, explicitly notes that railroad participation in the initial determination of "the type of warning device to be installed" at particular crossings is subject to the Secretary's approval.

Id. Furthermore, this Court declared, in all federally funded projects, FHWA regulations alter state and railroad decisionmaking in device selection by prescribing that railroads may not be made to pay installation costs. *Id.* (citing 23 C.F.R. § 646.210(b)(1)). Thus, where they apply, the FHWA warning-device regulations impose

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16 Some States, like Tennessee, do not even allow railroad personnel on their diagnostic teams. *Cf. MUTCD* at 8D-1 ("The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations").

requirements in a selection process and thereby supersede state tort law duties of care.

The regulations of (b)(3) and (b)(4) apply in "*any project* where Federal aid-funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i) (emphasis added). Accordingly, this Court held,

> *for projects in which federal funds participate in the installation of warning devices,* the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 507 U.S. at 671 (emphasis added).

It is notable that, in reaching this holding, the Court followed not only the plain meaning of FRSA and the regulations, but also the interpretation of them advanced by the Solicitor General of the United States and the Department of Transportation. The unqualified position of the United States was that "the Secretary has preempted States from imposing . . . duties" of care under state law "with respect to grade crossings where the safety devices have been installed with the use of federal funds." Brief for the United States as *Amicus Curiae* at 10, *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993) (Nos. 91-790, 91-1206) (Aug. 27, 1992) ("*U.S. Easterwood Br.*"); see also *id.* at 17 ("Federal law has not preempted all state law duties on railroads to maintain safe grade crossings, but has preempted such duties at grade crossings improved using federal funds") (boldface capitalization omitted); *id.* at 18 (With regard to "common law duties to participate in the process of providing safe grade crossings to

the public," "Section 434 of FRSA [now codified at 49 U.S.C. § 20106] compels the conclusion that federal regulations supplant that duty . . . in the circumstances addressed in federal regulations, 23 C.F.R. 646.214(b), covering the selection of warning devices where those devices are installed with federal funds."); *id.* at 24 ("The scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate.") The Solicitor General's reasoning paralleled the Court's in *Easterwood*:

> One regulation, 23 C.F.R. 646.214(b), specifically mandates . . . the safety devices necessary for adequate warnings at crossings improved with the use of federal funds. That regulation lists particular circumstances in which gate arms are required, and mandates that the warning devices at crossings not requiring gate arms are subject to FHWA approval. In view of its comprehensive scope, we believe that 23 C.F.R. 646.214(b) covers the subject matter of adequate warning devices at federally funded grade crossings, and therefore preempts States from requiring more or different devices at such locations.

Id. at 12.

The majority of federal courts of appeals and state supreme courts have understood the clear holding of *Easterwood*: inadequate device claims are preempted whenever "federal funds participate in the installation of warning devices." *Easterwood*, 507 U.S. at 671. In fidelity to *Easterwood*, these courts have rightly concluded that "[f]ederal funding is the touchstone of preemption in this area," *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 922 (8th Cir. 1999) (internal quotation marks omitted), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538), because federal funding triggers

the application of 646.214(b)'s federal-law requirements for the selection of warning devices at railway crossings. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995); *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

In *Easterwood*, this Court, after establishing the pre-emptive force of 23 C.F.R. § 646.214, found the regulation to be inapplicable because the "facts [did] not establish that federal funds participated in the installation of the warning devices" at the crossing in question. 507 U.S. at 672 (internal quotation marks and original brackets omitted). Federal funds had only been used to pay for motion-detection circuitry, but such circuitry did not fit the regulatory definition of warning devices. *Id.* at 672 & n.11. Because federal funds had not been used to install warning devices, the federal regulation was inapplicable, and Ms. Easterwood's grade-crossing claim was not pre-empted. *Id.* at 673. Here, there is no dispute that the crossbucks and advanced warning sign installed at Oakwood Church Road in 1987 are passive warning devices within the meaning of FHWA regulations.[17] Nor is it disputed that "Federal aid-funds participate[d] in the installation of the devices," 23 C.F.R. § 646.214(b)(3)(i), for indeed federal funds covered 99% of the costs of the project. J.A. 133. Because the regulation is applicable, respondent's grade crossing claim is preempted under the FRSA. *Easterwood*, 507 U.S. at 670.

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17 "*Passive warning devices* means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." 23 C.F.R. § 646.204.

II. THE DECISION BELOW IS PREDICATED ON MISREADINGS OF *EASTERWOOD*, THE FEDERAL RAILROAD SAFETY ACT, AND THE FEDERAL WARNING-DEVICE REGULATION.

Despite the clarity of *Easterwood*, the Sixth Circuit refused to give this Court's opinion a "literal reading." Pet. App. 11a-12a (quoting *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307 (7th Cir. 1994)). Disregarding this Court's holding that when 23 C.F.R. § 646.214(b)(3) and (4) "*are applicable*, state tort law is pre-empted," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 670 (1993) (emphasis added), the Sixth Circuit imposed a second requirement that effectively negates the rule established by this Court. Under the Sixth Circuit's two-part test, "a court must first establish that (b)(3) and (b)(4) are applicable, *and then* establish that either (b)(3) or (b)(4) was, in fact, applied." Pet. App. 13a (emphasis added). To meet the second prong of this test, the Sixth Circuit required evidence (beyond the Secretary's approval of federal funds for the installation of warning devices) that "the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)." *Id.*

Beyond being flatly in conflict with *Easterwood*, the Sixth Circuit's test is irreconcilable both with the FRSA and the federal warning-device regulation. The court of appeals failed to consider that the source of preemption under the FRSA is the "regulation . . . covering the subject matter of the State requirement." 49 U.S.C. § 20106. Because preemption flows from the requirements of the federal regulation itself, this Court held in *Easterwood* that if the warning-device regulation of 23 C.F.R. § 646.214(b) is applicable—*i.e.*, "[f]ederal aid-funds participate in the installation of the devices," 23 C.F.R. § 646.214(b)(3)(i)—state law claims challenging the

adequacy of the devices are preempted. Preemption does not depend on how the regulation may be implemented by a federal employee in one of the local FHWA divisions that has oversight responsibility for a particular state crossing project.

In addition, the Sixth Circuit thoroughly misapprehended the federal warning-device regulation and the actions it requires of FHWA officials. It disregarded the language of 23 C.F.R. § 646.214(b) and its origins. Moreover, the court's interpretation of the regulation as requiring the FHWA to make an independent evaluation of whether passive or active devices were appropriate for a specific crossing, Pet. App. 13a, is made up out of whole cloth.

The language of the regulation certainly does not require any crossing-specific determinations by the FHWA. Section (b)(3) mandates that, if federal funds participate in the installation of warning devices, the State must install automatic gates with flashing lights if the high-risk conditions enumerated therein exist, 23 C.F.R. § 646.214 (b)(3)(i). Subsection (b)(3) only expressly requires an FHWA determination if the state highway agency seeks a waiver of the automatic-gate requirement; in such "individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable." *Id.* § 646.214(b)(3)(ii).

Subsection (b)(4) likewise requires no specific determination by the FHWA of the conditions at particular crossings and the type of warning devices to be installed. Where "the requirements of § 646.214(b)(3) are not applicable," *id.* § 646.214(b)(4)—*i.e.*, where the State is seeking to use federal funds for passive warning devices (or active devices other than gates)—subsection (b)(4) provides that "the type of warning device to be

installed, whether the determination is made by a State . . . agency, and/or the railroad, is *subject to the approval* of FHWA." *Id.* (emphasis added). See *Easterwood*, 507 U.S. at 666-67. This language is critical; it affirmatively does not require (as the Sixth Circuit wrongly assumed) that "the Secretary or one of his agents actually determine[] . . . that only passive warnings were needed pursuant to (b)(4)," Pet. App. 13a. Rather, the regulation reserves to the FHWA the power to veto the warning devices selected by the state agency or railroad. Nothing in the regulation specifies how the FHWA official responsible for project oversight shall exercise that authority, or what determinations he must make personally in order to approve a warning-device installation project.

This reservation of discretion to the FHWA in section 646.214(b) as to how to conduct oversight of federally funded crossing projects makes sense in light of the overall design of the Section 130 crossing program, which the Sixth Circuit failed to consider. FHWA project approvals are done in the field; the 1987 TDOT installation project at issue in this case, for example, was approved by the Division Administrator for Tennessee. See J.A. 128. The FHWA Divisions are paired with a single State department of transportation [18] and are deeply familiar with the State's processes, by operation of law and as a matter of practice. Federal law requires the States to make annual reports to the Secretary on their crossing programs, 23 U.S.C. § 130(g), and the FHWA (as delegatee of the Secretary) must in turn report annually "on

[18] The FHWA currently has 52 divisions (one for each State, the District of Columbia, and Puerto Rico) located in the same city as the state department of transportation with which it partners. *See* Federal Highway Administration, U.S. Dep't of Transportation, *FHWA Field Offices* (last modified Oct. 5, 1999) <http://www.fhwa.dot.gov/field.html#fieldsites>.

the progress being made by the State[s] in implementing projects to improve railway-highway crossings," and "analyze and evaluate each State program [and] identify any State found not to be in compliance with the schedule of improvements required by subsection (d)." *Id.* In 23 C.F.R. § 924, the FHWA has "outlined the basic components which must be part of all programs and has listed key elements which must be included in the processes which make up these components." Establishment of Regulations, 44 Fed. Reg. 11,543, 11,544 (Mar. 1, 1979). Beyond establishing the components of the state program, the FHWA has monitored state programs by requesting not only the data mandated by Congress, but also "certain evaluation information administratively determined by the FHWA to be clearly necessary for the effective implementation of the safety improvement program," and "appropriate supplementary data . . . submitted annually by FHWA field offices." *Id.* The pattern of close FHWA involvement with the States was firmly established by the mid-1980's, because in the first decade of the federal Section 130 program the FHWA's "primary emphasis . . . [was] to assist the [States] in the development of their individual processes." Federal Highway Administration, U.S. Dep't of Transportation, *The 1987 Annual Report on Highway Safety Improvement Programs* 17 (1987). Indeed, in 1987, the FHWA was able to report that it had approved the processes of 49 States (including Tennessee) in operating their highway safety programs. *Id.* The very fact that States receive federal highway funds is proof that FHWA has approved their process. See 23 C.F.R. pt. 1206.

Given this program of highly integrated " 'cooperative federalism,' " see *New York* v. *United States*, 505 U.S. 144, 167 (1992); *King* v. *Smith*, 392 U.S. 309, 316 (1969); 23 C.F.R. § 1.3, it is unsurprising that regula-

tion 646.214(b) does not set an iron rule that for each project (no matter how many crossings are covered) an FHWA official must become immersed in the data of every single crossing and check the work of the state highway agency. The responsible FHWA official determines what degree of scrutiny is appropriate to ensure compliance with federal law (including the adequacy of devices) as a prerequisite to federal funding. 23 C.F.R. § 630.106(a); *id.* § 630.114(b) (1988). If the FHWA official has confidence in the State's systematic, technical processes for evaluating crossing conditions to comply with (b)(3) mandates and its track record in determining adequate crossing devices, nothing in the regulation requires a duplicative federal determination of crossing-specific conditions. The FHWA has discretion to rely on the determinations of the state agency as to whether (b)(3) conditions exist. On the other hand, the regulations also require the State to submit "plans, specifications, and estimates (PS&E), and supporting documents" for every federal project, *id.* § 630.201, which must "describe the location and design features and construction requirements in sufficient detail" for FHWA evaluation, *id.* § 630.205(b). The FHWA is free to prescribe the contents of those plans, specifications, and estimates. *Id.* § 630.205(a). Thus, the FHWA may make the actual determination of crossing conditions through this review process, if that is deemed necessary to ensure the adequacy of the warning devices installed. The regulations are designed to give the FHWA the maximum flexibility to ensure efficient and effective implementation of the Section 130 crossing program.

Even if it were not so clear from the text and structure of 23 C.F.R. § 646.214(b) that the FHWA may rely on state highway agency determinations of crossing conditions, the historical origin of the regulation lays the issue

to rest. Under 23 U.S.C. § (e), enacted decades before the Section 130 program, see *supra* at 6, the Department of Transportation long has had the responsibility of ensuring that warning devices at railway crossings within or near federal-aid highway projects meet federal adequacy standards before a project may be approved. Indeed, the adequacy standards of 23 C.F.R. § 646.214(b) are simply modifications of the longstanding standards that the Secretary developed under section 109 and that were published in Bureau of Public Roads, U.S. Dep't of Commerce, Policy and Procedures Memorandum 21-10, *Elimination of Hazards of Railway-Highway Crossings* (1958) ("PPM 21-10"). See Reimbursement for Railroad Work and Railroad-Highway Projects, 40 Fed. Reg. 16,057, 16,057 (Apr. 9, 1975).

Under the FHWA's traditional practice, the FHWA set the standards of adequacy of warning devices for specified crossing conditions, but commonly relied upon an expert state agency's determination of whether those conditions existed at a particular crossing. The 1958 version of PPM 21-10, at the time issued by the Bureau of Public Roads (the predecessor of the FHWA), is illustrative. PPM 21-10 states that "[i]nstallations of protective devices, when made in accordance with the following standards and controls, will be considered as complying with the safety standards determined by the United States Bureau of Public Roads as being adequate at that time." PPM 21-10 ¶ 20(c). Among those standards was the following mandate:

> All grade crossings of highways with (a) multiple main line railroad tracks; (b) multiple track crossings with or without main tracks on which more than one train may occupy the crossing at the same time; (c) single or multiple track crossings where operating speeds are 70 miles per hour or greater and sight distances are restricted; are to be protected with flashing light signals with short-arm gates.

Id. ¶ 20(c)(4). For all other crossings, PPM 21-10 provided that

> "in States where authority and responsibility for determination of the type of protective device has been delegated by State law to a public utilities commission or other similar State agency, *the findings and recommendations of such authorized commission or agency will, if made, be accepted by the Bureau of Public Roads even if of a general or Statewide nature and not for a specific project,* provided such findings and recommendations are concurred in by the State highway department.

Id. ¶ 20(c)(5) (emphasis added). In the absence of any findings and recommendations, or of delegation of state authority to such commission or agency, the Bureau of Public Roads and state highway agency would reach agreement as to what type of device would be acceptable. *Id.* ¶ 20(c)(5) & (6). Thus, it has long been the practice of the FHWA (and its predecessor) to accept the determinations of an expert state agency in approving the adequacy of protective devices.

PPM 21-10 continued into the 1970's largely unchanged. In March, 1973 (during the time the Highway Safety Act of 1973 was being considered), the FHWA issued a notice urging its Regions and Divisions to promote the use of automatic gates at certain kinds of crossings other than the three at which they were mandatory:

> Special consideration should be given to using gates at crossings with any of the following characteristics:
>
> 1. High vehicle and train traffic volumes.

2. High train speed.
3. High approach vehicle speed.
4. Moderately high combination of volume and speed.
5. Usage by school buses and/or vehicles transporting hazardous materials.
6. Other high hazard characteristics, such as continuing accident occurrences even though active protection devices are in place.
7. Crossings used by through trains where switching operations take place in proximity to the crossing.

Federal Highway Administration, U.S. Dep't of Transportation, HNG-14, *Notice: Elimination of Hazards of Railroad-Highway Grade Crossings—Use of Automatic Gates* (1973).

In promulgating its warning-device regulation in 1975, the FHWA expanded the category of crossings for which automatic gates were mandatory, incorporating certain of the "special consideration" conditions from the 1973 Notice. See 23 C.F.R. § 646.214(b)(3)(i).[19] For crossings where automatic gates were not mandatory, the state agency's findings and recommendations are no longer conclusive, as they had been under PPM 21-10, but rather the selection of devices is "subject to [FHWA] approval." *Id.* § 646.214(b)(4). But nothing in the regulation (or in the FHWA's implementation of the regulation since

[19] Shortly after 23 C.F.R. § 646.214 was promulgated, the FHWA issued instructions that PPM 21-10 was superseded. *See* Federal Highway Administration, U.S. Dep't of Transportation, Transmittal 129, *Federal-Aid Highway Program Manual* (Apr. 25, 1975). Petitioner has lodged with the Court the documents provided by FHWA that trace the history of PPM 21-10 until its supersession. The 1973 Notice has also been lodged with the Court.

1975) suggests that the FHWA departed from its historic practice of relying on expert state determinations in approving the adequacy of warning devices.[20]

Indeed, any other approach would be unworkable over the vast national network of highways that receive federal highway funds. Under the federal highway program, the Secretary of Transportation must ensure that the facilities selected for every project are the "best suited" for adequate safety, durability, and economy of maintenance, 23 U.S.C. § 109(a); that signage and traffic signals on federally funded highway projects "will promote the safe and efficient utilization of the highways," *id.* § 109(d), and, in particular, that protective devices are adequate at any railway crossing within or near a federal-aid highway project or where federal funds participate in the installation of the devices, *id.* § 109(e); 23 C.F.R. § 646.214(b)(3)(i). There have been more than 30,000 grade crossing projects since 1974, *1996 Annual Report* at IV-2, many involving hundreds of crossings in a single project (like the 1987 TDOT project); there have been countless other federal-aid highway projects where the adequacy of nearby crossing protective devices had to be approved under 23 U.S.C. § 109(e). It would be unrealistic and

[20] It should be noted that, of the (b)(3) criteria for identifying crossings where gates and flashers are mandatory, only one is determinate. *See* 23 C.F.R. § 646.214(b)(3)(i)(A) ("Multiple main line tracks"). The rest are either general guidelines or require the application of judgment, and the FHWA has traditionally allowed individual States latitude in applying them. For example, one criterion for mandatory gates and flashers is the presence of "substantial numbers of schoolbuses or trucks carrying hazardous materials." *Id.* § 646.214(b)(3)(i)(E). The FHWA has refused to use quantifiable measures to further define this criterion, and has left it to the States to determine, based on their own methodology and factfinding, when those numbers become substantial enough to make a crossing hazardous. *See* Establishment of Regulations, 44 Fed. Reg. 11,543, 11,543 (1979).

wasteful, and contrary to congressional policy to "prevent needless duplication and unnecessary delays" in the administration of the federal highway program, 23 U.S.C. § 101(e), for the FHWA to replicate the work done by state highway agencies by "actually determin[ing]," Pet. App. 13a, independently what protective devices should be installed at all these crossings. Contrary to the Sixth Circuit's assumption, that has never been the FHWA's practice, and that is not what 646.214(b) requires.

The Sixth Circuit simply refused to recognize that the Section 130 Railway Crossings Program is a federal-state partnership, one where the state has principal authority for selecting warning devices, and the FHWA acts in a rule-setting and oversight capacity. The FHWA mandates gates and flashers for certain kinds of crossings under (b)(3), and retains the right of approval for all others under (b)(4). Under (b)(4), the FHWA may rely on the state agency's findings in approving federal funding for devices, but that does not alter the fact that the devices "have, by definition, been specifically found to be adequate under a regulation issued by the Secretary." *U.S. Easterwood Br.* at 24. See also, *e.g.*, *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996) (authorization of federal funding for passive warning devices under (b)(4) is "tantamount to a determination . . . that only passive, rather than active, warning devices [a]re sufficient"); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 387 (5th Cir. 1995). This is not a mere "fiction of constructive approval," as the Sixth Circuit repeatedly mischaracterizes it, see Pet. App. 14a, 18a; it is the approval called for by 23 U.S.C. § 109(e) and the FHWA regulations. Nor is there any basis for the Sixth Circuit's cavalier statement that, absent an FHWA official's determination of what device is required for a particular crossing, "no one is responsible for the safety of motorists who use the crossing," *id.* at 16a. That demeans

the state highway agencies whose efforts in implementing the Section 130 program are the principal reasons for its overwhelming success, and it betrays the court of appeals' blatant disregard of the integrated federal-state structure of the program.[21]

In sum, the Sixth Circuit's analysis of this issue is wrong, both because it conflicts with *Easterwood* and because it misreads the statute and the regulation, which were properly interpreted in *Easterwood*. The FHWA warning-device regulation covers the subject matter of state tort law because it relegates the railroad's role in selecting warning devices to participating in diagnostic teams, and as a matter of federal law it defines a decision process in which the FHWA has final authority. *Easter-*

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[21] The Sixth Circuit's opinion is riddled with other logical errors and unfounded assertions that are contrary to the statutory and regulatory scheme. First, the court of appeals reasoned that railroads "get a huge benefit if they work with the state to take the desired action" to obtain federal funds, Pet. App. 18a; this simply ignores the determination of Congress and the FHWA that grade crossing improvements confer no net benefit on railroads. 23 U.S.C. § 130(b); 23 C.F.R. § 646.210(a), (b)(1). Second, the Sixth Circuit wrongly characterized the FHWA regulation on adequate devices as "a system of incentives" for the states and the railroads, remarking that "[i]t takes nothing more than a rudimentary understanding of economics to see that an incentive-based system does not work unless the reward is somehow tied to performance of the desired action." Pet. App. 17a-18a. But the regulation is not a system of incentives at all to guide railroad decisionmaking, but instead (as this Court said in *Easterwood*) the system embodies rules that "displace state and [railroad] decisionmaking." 507 U.S. at 670; *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997) (the regulation strips decisionmaking authority from the railroad and gives it to the FHWA). Furthermore, under the Sixth Circuit's erroneous approach, the purported "incentive" of preemption is not tied to any "performance of desired action" by the railroad, as it claimed. Rather, under its test, preemption depends on the action that a FHWA official takes regarding a particular crossing, over which the railroad has no control.

wood, 507 U.S. at 671; see also *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538) (" 'the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands' ") (alteration omitted) (quoting *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996)). Under FRSA, the regulation itself preempts state law, see 49 U.S.C. § 20106, and therefore preemption occurs whenever the regulation is applicable (*i.e.*, when federal funds participate in the installation of warning devices). *Easterwood*, 507 U.S. at 670. Because federal funds participated in the installation of warning devices at Oakwood Church Road crossings, respondent's state-law claims against petitioner regarding the adequacy of warning devices are preempted.

III. THE SIXTH CIRCUIT'S RULE IMPOSES AN IMPOSSIBLE BURDEN ON RAILROADS BECAUSE ALL RELEVANT EVIDENCE IS UNOBTAINABLE UNDER 23 U.S.C. § 409.

The Sixth Circuit's rule is not only incompatible with *Easterwood*, the FRSA, and the language, structure, and history of the FHWA warning-device regulations, but it also effectively nullifies *Easterwood* because it makes preemption literally impossible to establish. It creates the irrational situation where a railroad must defend the adequacy of a federally installed warning device when all evidence relevant to preemption is legally inadmissible and not even discoverable.

Under the Sixth Circuit's rule, a railroad can only establish preemption if it proves, not only that federal funding for the project was approved, but also that "the Secretary or one of his agents actually determined that

active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)." Pet. App. 13a; see *id.* at 22a. This rule nullifies *Easterwood* preemption for three reasons.

First, as previously discussed, the regulation does not require that the FHWA actually make these crossing-specific determinations, and as a general rule the FHWA does not do so; it relies on the state highway agencies.[22]

Second, because this is not the practice of the FHWA, evidence of a determination regarding a specific crossing (that the Sixth Circuit wrongly assumed that FHWA officials make) simply does not exist, and as a practical matter railroads could never establish an *Easterwood* preemption defense under this rule. FHWA regulations make clear that, after the FHWA completes its review of any plans, specifications, and estimates, see 23 C.F.R. § 630.201-.205, typically the only documentation created is a project agreement between the State and the FHWA whereby the State binds itself, *inter alia*, to comply with all applicable federal statutes, regulations, and applicable FHWA policies and procedures, *id.* §§ 630.301-.303.[23] Such a standard-form project agreement was submitted in this case, J.A. 128, but was held insufficient by the Sixth Circuit to establish preemption. Pet. App. 22a. As a general rule, the evidence demanded by the Sixth Circuit—a separate "approval of the Secretary or his agent, of the use of passive warning devices at a particular crossing," *id.*—is a chimera of its imagination.

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[22] The FHWA approval in this case was in accord with general practice. An FHWA official submitted an affidavit that it relied on TDOT to determine the warning devices that were proper in the project at issue. J.A. 125-26.

[23] Federal regulations require an authorization to proceed as well as a project agreement, *see* 23 C.F.R. § 630.106, but the two documents may be combined, *id.* § 630.303(c).

Third, even if such a crossing-specific "approval" report did somehow exist, federal law clearly prohibits the discovery or use of such evidence in actions such as this one. 23 U.S.C. § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[24]

23 U.S.C. § 409.

Federal and state courts applying § 409 have interpreted this prohibition broadly, inferring that it is designed "to 'facilitate candor in administrative evaluations of highway safety hazards,'" *Harrison* v. *Burlington Northern Railroad Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pacific Railroad Co.*, 954

[24] Section 409 was enacted as part of the Surface Transportation Act of 1987, Pub L. No. 100-17, § 132(a), 101 Stat. 132, 170. Congress has amended § 409 twice since it was enacted, both times expanding its scope. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1035(a), 105 Stat. 1914, 1978 (adding that protected information shall not be "subject to discovery" as well as being inadmissible in civil cases); National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 323, 109 Stat. 568, 591 (including data "collected" in addition to "data compiled" among the types of protected information).

F.2d 1433, 1435 (8th Cir. 1992), and "to prohibit federally required record-keeping from being used as a 'tool . . . in private litigation,'" *Robertson*, 954 F.2d at 1435 (omission in original); *Light* v. *State*, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). Thus, for example, courts have held excluded under § 409: government officials' evaluations of safety conditions at specific crossings, *Harrison*, 965 F.2d at 159; *Sawyer* v. *Illinois Central Gulf Railroad Co.*, 606 So. 2d 1069, 1072-73 (Miss. 1992); letters from government officials recommending safety devices at specific sites, *Sawyer*, 606 So. 2d at 1072-73; *Miller* v. *Bailey*, 621 So. 2d 1174, 1182 (La. Ct. App. 1993); and even a newspaper article using safety data compiled by state officials relating to a particular crossing, *Robertson*, 954 F.2d at 1434-35.

Under the plain terms of § 409, any determination by FHWA, in relation to a request for Federal funds, that a specific crossing either (a) requires active warning devices under 23 C.F.R. § 646.214(b)(3), or (b) may maintain a passive warning system under (b)(4), would be undiscoverable and inadmissible. Such a determination by FHWA, if recorded, would be part of a "report[]," "survey[]," or "list[]," and would reflect "data compiled or collected." 23 U.S.C. § 409. Such information would have been prepared for "the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings." *Id.* And finally, it would have been prepared "for the purpose of developing [a] highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds," as well as prepared "pursuant to section[] 130" of Title 23 (authorizing the Secretary of Transportation to evaluate railway-highway crossing projects, and to determine federal funding for such projects). *Id.* Accordingly, § 409 requires that such evidence "*shall not be subject to discovery or admitted into evidence* in a Federal or State court pro-

ceeding *or considered for other purposes* in any action for damages arising from any occurrence at [the site]." *Id.* (emphases added). The Sixth Circuit's strained interpretation to the contrary, developed to avoid the implications of its erroneous preemption rule, cannot withstand scrutiny.

Section 409 also highlights the irrationality of the Sixth Circuit approach, compared to the proper working of *Easterwood* preemption. The thrust of the Section 130 program, and the preemptive 1975 FHWA regulations defining federal standards and procedures for ensuring the adequacy of warning devices selected by the State, has been to make the installation of federally funded warning devices a matter of rational, expert determination based on hard evidence and traffic engineering analysis. The bright-line rule of *Easterwood*, where preemption turns on the applicability of federal-law requirements that accompany federal funding of crossing projects, fosters this goal. When the FHWA approves installation of the devices with federal funds, the crossing is in effect "federalized" and any independent state-law duty of the railroad to determine the adequacy of warning devices is preempted; the railroad's involvement is limited to participation in a diagnostic team that the State may assemble for a crossing, *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658, 671 (1993), but only if such participation is invited by the State. After the federally funded devices are installed, it is the State that has the duty under the Section 130 crossing program to monitor the crossing to determine if additional devices are needed, and to schedule any required upgrade projects. And the States and the railroads have their respective federal duties to update the crossing inventory to ensure that the proper information is supplied for hazard evaluation. This system has worked remarkably well, as the continuing decline in accident and

fatality rates attests. See *supra* at 18-19. Indeed, based on technical analysis, the States have in fact continuously upgraded crossings where the existing devices had been installed with federal funds. See, *e.g.*, *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 921 (8th Cir. 1999), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996).

The *Easterwood* scheme is sound public policy: each entity is at all times aware of its responsibility for protecting the public, and is not left to litigate an alleged responsibility at some indefinite future time after someone is killed or injured. Under the Sixth Circuit's approach, not only does § 409 preclude the railroads from establishing *Easterwood* preemption, but it also bars them in the trial on the merits from discovering or introducing into evidence any of the data, reports, or surveys that might prove that reasonable care was used in the selection of the devices. If the rule of the Sixth Circuit stands, railroads can only defend themselves by engaging in wasteful duplication of the States' survey and hazard analyses of the nation's more than 158,000 public grade crossings, *1998 Safety Report* at 9-7 (Table 9-2). This is contrary to reason and the federal scheme that Congree so carefully crafted.[25]

---

[25] *Easterwood* preemption of state-law claims that the devices installed were inadequate does not eliminate a railroad's tort liability regarding grade crossings. Railroads would remain responsible in tort for injuries caused by their failure to meet their federal safety responsibilities (such as fraud or negligence in performing these assigned tasks in the federal crossing inventory program), as well as other state law responsibilities that are not preempted. Under federal law, railroads have a duty, *inter alia*, to participate in state highway improvement programs (23 C.F.R. pt. 924), to keep warning devices in proper working order (49 C.F.R. pt. 234), to trim vegetation along their tracks to ensure proper visibility (*id.* at § 213.37), and to travel within federally

This Court stated the proper rule in *Easterwood*. The FHWA warning-device regulation set forth at 23 C.F.R. § 646.214(b) imposes federal-law requirements on the process of selecting warning devices and reserves final authority in that process to the FHWA. *Easterwood*, 507 U.S. at 670-71. The regulation covers the subject matter of a railroad's state tort law duties of care in the selection of devices, and therefore preempts that law whenever the regulation applies. *Id.* at 670. It applies to all projects in which federal funds participated in the installation of warning devices, *id.* at 671, such as the 1987 TDOT project at issue here, and thus respondent's inadequate-device state law claims are preempted.

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imposed speed limits (*id.* at §§ 213.9, 236.501-.505). Railroads may be held liable under state law for negligence in the construction or maintenance of selected devices, *see, e.g., Ingram* v. *CSX Transportation, Inc.*, 164 F.3d 858, 866 (11th Cir. 1998) (discussing *Michael* v. *Norfolk Southern Railway Co.*, 74 F.3d 271, 273 (11th Cir. 1996)), among a host of other negligence theories. Thus, there is no dispute that Ms. Shanklin is entitled on remand to a trial on her three remaining theories of petitioner's liability under state law: namely, the alleged failure of petitioner to (1) sound the horn in a timely fashion; (2) apply the brakes in a timely fashion; and (3) remove vegetation from the crossing. *See* Pet. App. 2a.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as
Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Is a state-law wrongful-death claim alleging that a railroad failed to install adequate warning devices at a railroad grade-crossing preempted by federal law when (a) federally mandated safety devices were not installed at the crossing, and (b) the federal government had funded only "minimum" signage for the crossing without regard to whether that signage was adequate to make the crossing safe?

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STATEMENT OF THE CASE

This case involves the "minimum protection program" created by Congress in 1973 to help fund the installation of standard crossbucks at public railroad crossings around the Nation. Because the federal government did not determine under this program whether the crossbucks would be adequate to protect particular crossings, funding under the program does not preempt Petitioner's settled state-law duty to provide adequate warning devices. The distinction between the "minimum protection program" and the distinct "hazard" program on which Petitioner's argument erroneously rests is evident from both federal railroad regulation and the program applied by the State of Tennessee in this case. The former is designed to warn of the mere presence of a railroad crossing ahead, while the latter uses "diagnostic teams" to assess what warning devices are required at individual crossings.

Part I below sets out the relevant statutory and regulatory structure. Part II reviews this Court's prior encounter with that structure in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Finally, Parts III and IV describe the facts of this case and the proceedings below.

I. Statutory and Regulatory Background

A. Provisions Governing State "Hazard" and "Minimum Protection" Programs

1. The Federal Programs

Nearly ten times every day, a train collides with a car or truck somewhere in the United States, frequently killing or grievously wounding the vehicle's driver and passengers. National Transportation Safety Board, *Safety Study, Safety at*

Passive Grade Crossings, Vol I: Analysis vii (adopted July 21, 1998). Fully 60% of the fatalities occur at crossings protected only by "passive" warning devices such as standard "crossbucks" (which are the only protection at two-thirds of the nation's 295,000 rail crossings) rather than "active" devices such as flashing lights and automatic gates triggered by the approach of an oncoming train. *Id.* at vii & Appendix A, Table 2.

Congress has provided financial assistance to help alleviate these grave dangers to the public. In 1970, Congress directed the Secretary of Transportation ("Secretary") to study the problem and to propose a plan of federal assistance. Federal Rail Safety Act of 1970, Pub. L. No. 91-458, § 204, 84 Stat. 971, 977. The Secretary's response recognized that conditions at many crossings, such as those with multiple lanes of vehicular traffic and trains traveling at high speeds, merited the advanced protection of flashing lights and automatic gates. But the Secretary also recognized that it would not be feasible for the federal government to pay to install advanced protection at all crossings in need. *See* U.S. D.O.T., *Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem* v-vi, 32-34 (1971) ("DOT Analysis").

The Secretary also concluded that thousands of rail crossings around the Nation, including many crossings in need of lights and gates, lacked even the minimum level of protection provided by the standard "crossbuck" described in the federal Manual on Uniform Traffic Control Devices ("MUTCD"). Regarding this lack of minimum protection, the Secretary explained that "correct[ing] this deficiency will require installation of an additional sign at those crossings now having only one, and will require installation of two crossbuck signs at the several thousand public crossings reported as having no signs or signals." *Id.* at 67. The Secretary

accordingly recommended that Congress make federal funds available to install crossbucks at *all* crossings to provide minimum protection on an urgent basis. U.S. D.O.T., *Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem* 90 (1972). The Secretary emphasized: "Installation of these signs [crossbucks] would be made without any prior benefit-cost analysis, on the basis that this is a *mandatory minimum requirement for safety." DOT Analysis* at 67 (emphasis added). Installing minimum signage thus presented an inexpensive means to ensure that all crossings had at least some protection. This view was confirmed by a Report to Congress submitted by the Federal Rail Administration:

> If every grade crossing could be protected with an active device, the problems experienced could be reduced to minimum levels. In view of generally limited monetary resources, however, it is, and will continue for many years to be, necessary to protect many grade crossings with devices that only inform the motorist of [the] hazard and place upon him the responsibility for a decision of whether or not it is safe to proceed. As a result, it is believed that the greatest immediate opportunity for the improvement of the motorist's decision making process is in the area of passive protection of grade crossings.

Federal Rail Administration, Report of Acting Administrator Carl V. Lyon 665 (Mar. 30, 1971).

Congress adopted the Secretary's recommendations in the Highway Safety Act of 1973, which authorized the use of federal funds to pay "the entire cost of construction of projects for the elimination of hazards at railway-highway crossings."

23 U.S.C. § 130(a). The statute did not mandate the installation of warning devices with railroad or State funds. Instead, it conditioned the receipt of federal funds on compliance with the two initiatives proposed by the Secretary:

> Each State [(a)] shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. [(b)] *At a minimum*, such a schedule shall provide signs for all railway-highway crossings.

Id. § 130(d) (emphasis added). In each State, the former requirement came to be known as the "hazard program," while the latter was known as the "minimum protection program."[1]

Memoranda prepared by the Department of Transportation in response to the Highway Safety Act of 1973 emphasize that the "minimum protection program" was a distinct initiative. The Federal Highway Administration ("FHWA") explained in 1974:

> Section 203(a) of the Highway Safety Act of 1973 requires *as a minimum* that each State's schedule of improvements shall provide signs at all crossings. As a first priority each State, in cooperation with the involved railroad and any other agency having jurisdiction, shall identify

[1] The "hazard" program is also sometimes referred to as the "priority" program. *See, e.g.*, JA 98 (testimony of engineer in charge of Tennessee crossing program).

> those grade crossings at which there are either no signs or nonstandard signs and institute an improvement program to provide signing and pavement marking in compliance with [the] Manual on Uniform Traffic Control Devices at all grade crossings.

FHMP 6-8-2-1 (Feb. 3, 1974) (emphasis added) (lodged with this Court); *see also* DOT/FHA Memoranda dated Oct. 8, 1975, June 17, 1977, and Oct. 8, 1978 (lodged with this Court).

2. States' "Hazard" and "Minimum Protection" Programs

States must prepare the schedule of crossing improvements required by Section 130(d) in conformance with 23 C.F.R. Part 924. Under the "hazard" program, States must request federal funds for advanced warning devices pursuant to "[a] process for collecting and maintaining a record of accident, traffic, and highway data," as well as "[a] process for analyzing available data," and "[a] process for establishing priorities for implementing highway safety improvement projects." 23 C.F.R. § 924.9(a)(1), (2), (4). Because the pool of federal funds available is limited, the States annually select what their data suggest are the most dangerous crossings. Those crossings are then studied individually by "diagnostic teams" that recommend particular warning devices. *See, e.g.*, Diagnostic Team Report & Minute Order, *reprinted from* Record in *Bock* v. *St. Louis Southwestern Ry. Co., pet. for cert. pending*, No. 99-538 (lodged with this Court). Based on that recommendation, States submit requests to FHWA for funding to install advanced warning devices.

Regarding the minimum protection program, the regulations direct that "special emphasis shall be given to the

legislative requirement that all public crossings be provided with standard signing." *Id.* § 924.9(b). States have exercised some flexibility in their minimum protection programs. Testimony in this case, for example, suggested that Tennessee required not just crossbucks but also pavement markings and an additional advance warning sign. JA 102, 103.[2]

In identifying crossings in need of minimum protection, States were not required to gather or analyze the more extensive data required to create the schedule of priority improvements mandated by 23 C.F.R. Part 924, and those crossings were not subject to individualized review by a specialized "diagnostic team." *Compare* JA 105, 107, 125, 126 (explaining that diagnostic team was used for evaluation on Tennessee's hazard program). Instead, States simply submitted *en masse* requests to the FHWA for funding, frequently to install minimum protection on hundreds or even thousands of crossings. *See, e.g.*, Pet. for Cert. in No. 99-538, *Bock v. St. Louis Southwestern Ry. Co.*, at 6 (273 crossings); *Shots v. CSX Trans., Inc.*, 38 F.3d 304, 306, 308 (7th Cir. 1994) (2,638 crossings). These requests did not provide the federal government any substantial data to evaluate the conditions at individual crossings. *See infra* at 31-37.

Pursuant to 23 U.S.C. § 130(d), Tennessee adopted both a "hazard" and a "minimum protection" program. Petitioner

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[2] It is not clear whether Petitioner is correct in contending that the Tennessee standard "goes far beyond the federal MUTCD minimum," Pet. Br. 19, given that the MUTCD in some circumstances requires the installation of more than merely crossbucks, *e.g.*, MUTCD at 8B-2, 8B-3, and 8B-4, and the trial testimony on the issue was not developed. All that matters for present purposes, however, is that the standard was a "minimum" and that States apparently exercised some degree of flexibility in setting the "minimum."

correctly recognizes that these are two separate programs. Pet. Br. 19; *accord* JA 105 (testimony of engineer in charge of Tennessee's crossing improvement program confirming that the State's hazard program is "not in any way connected with the minimum protection program other than being administered by [the Tennessee Department of Transportation]"). Under the "minimum protection" program, every crossing that "would take it" must be protected by a "minimum" of "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings." Pet. Br. 20 (citing JA 102-03). The warning devices at issue in this case were installed pursuant to the Tennessee "minimum protection program," *see infra* at 31-32, and accordingly it is that program that is at issue in this case.

B. 23 C.F.R. § 646.214

FHWA regulations govern the "[d]esign" of warning devices on railroad-highway projects. 23 C.F.R. § 646.214. Warning devices for which federal funding is sought must "comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards." *Id.* § 646.214(b)(1); *see also* 23 C.F.R. § 655.601-.603 (incorporating MUTCD into federal regulations by reference). The MUTCD sets out uniform requirements for railroad-crossing signs, including size, shape, and color. *See Easterwood*, 507 U.S. at 669. In addition, the MUTCD requires that, at the least, each crossing be protected by a single crossbuck on either side of the track and, in certain circumstances, by additional devices such as pavement markings. *See.* MUTCD at 8B-4.

The regulation also defines the term "adequate warning devices" for purposes of "any project where Federal-aid funds

participate in the installation of the devices." When "(b)(3) conditions" (so-called because they are set forth in 23 C.F.R. § 646.214(b)(3)) exist – such as "[h]igh [s]peed train operation," a "combination of high speeds and moderately high volumes of highway and railroad traffic," "unusually restricted sight distance," and "continuing accident occurrences" – "adequate warning devices" must include flashing lights and lowering gates. 23 C.F.R. § 646.214(b)(3)(i). Alternative devices may be used only "[i]n individual cases where a *diagnostic team* justifies that gates are not appropriate" and the FHWA agrees. *Id.* § 646.214(b)(3)(ii) (emphasis added). When "the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed * * * is subject to the approval of FHWA." *Id.* § 646.214(b)(4).

II. This Court's Decision in *CSX Transportation, Inc.* v. *Easterwood*

This Court addressed the preemptive effect of federal railroad regulation in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). The plaintiff's husband in *Easterwood* was killed in an accident at the Cook Street Crossing in Cartersville, Georgia. As required by 23 U.S.C. § 130(d) and 23 C.F.R. Part 924, the State of Georgia had included the crossing in its inventory and had determined to add automatic gates to the flashing lights already protecting the crossing. *Easterwood*, 507 U.S. at 671-72. As required by 23 C.F.R. § 646.214, the State apparently requested and received federal funds for that purpose. The State, however, ultimately decided to spend the funds to install lights and gates at nearby crossings instead and to install, at the Cook Street Crossing, only new circuitry for the existing lights. *Id.*

This Court unanimously held that the plaintiff's inadequate warning device claim was not preempted. The

Court began by emphasizing that, in areas "traditionally governed by state law" such as tort liability, federal courts are "reluctant to find pre-emption" so as to avoid "unintended encroachment on the authority of the States." *Easterwood*, 507 U.S. at 663-64. This "presumption against pre-emption" is heightened under the preemption provision of the FRSA, which provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order–(1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation or order of the United States Government; and (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (then codified at 45 U.S.C. § 434). This Court recognized that, by limiting preemption to federal law that "cover[s] the subject matter of" state law, Congress had used a "restrictive" term that "is in turn employed within a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express savings clauses" 507 U.S. at 664, 665. Accordingly, the Court held that "preemption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law." *Id.* at 664 (emphasis added).

The Court then rejected the railroad's argument that preemption arose from 23 U.S.C. § 130(d) and 23 C.F.R. Part 924. As explained *supra* at 5, under those provisions, States are entitled to receive federal funds to install warning devices only if they spend those funds in accordance with a priority list of hazard crossings. This requirement, the Court explained, merely "establish[es] the general terms of the bargain between the Federal and State Governments: The States may obtain federal funds if they take certain steps to ensure that the funds are efficiently spent." 507 U.S. at 667. Such a "federal effort to encourage the States to rationalize their decisionmaking has little to say about the subject matter of negligence law." *Id.* "In fact, the scheme of negligence liability could just as easily complement these regulations by encouraging railroads – the entities arguably most familiar with crossing conditions – to provide current and complete information to the state agency responsible for determining priorities for improvement projects in accordance with [23 C.F.R.] § 924.9." *Id.* at 668; *see also id.* ("the regulations provide no affirmative indication of their effect on negligence law").

The Court also rejected the claim that preemption arose from the federal requirement that crossings comply with the MUTCD. Noting the "implausibility" of that theory, the Court explained that this argument assumed "that established state negligence law has been implicitly displaced by means of an elliptical reference in a Government Manual otherwise devoted to describing for the benefit of state employees the proper size, color, and shape of traffic signs and signals." *Easterwood*, 507 U.S. at 669. In reality, the MUTCD "disavows any such pretensions" and "provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between the Federal and State Governments and between States and railroads." *Id.* (citing MUTCD, at 1A-4).

Finally, the Court addressed a third possible basis for preemption not asserted by the railroad or discussed by the lower courts. Under 23 C.F.R. § 646.214(b)(3) and (4), Georgia's request to use federal funds to upgrade a particular crossing's protection with active warning devices was subject to federal approval. "[A] project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] devices.'" *Easterwood*, 507 U.S. at 670 (quoting 23 C.F.R. § 646.214(b)(3), (4)). In addition, the regulation sets the terms of railroads' involvement in the selection of warning devices by envisioning "railroad involvement in the selection of warning devices through their participation in diagnostic teams" and by providing that "railroad participation in the initial determination of 'the type of warning device to be installed' at particular crossings is subject to the Secretary's approval." *Id.* at 671. In such a circumstance, a plaintiff's claim would be preempted because "the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." *Id.*

The Court concluded that preemption did not apply, however. Although Georgia had requested and received federal funds to install automatic gates at the Cook Street Crossing, it subsequently decided to install the gates at another crossing and to install only new circuitry – which did not, under applicable federal regulations, qualify as a "warning device" – at the Cook Street Crossing. *Id.* at 672.

III. Factual Background And District Court Proceedings

On October 3, 1993, in the darkness before dawn, Eddie Shanklin was driving his car well below the posted speed limit on a local road in Gibson County, Tennessee as he approached

the Oakwood Church Road railroad grade-crossing. JA 54, 70-71. As testimony later established, the crossing was unusually dangerous due to the presence of a variety of hazardous conditions. Despite these hazards, the railroad had never installed any warning devices beyond the existing "passive" signs.

As Mr. Shanklin approached, so did a train operated by Petitioner Norfolk Southern. Mr. Shanklin could not see the train coming, if at all, until it was so close upon him that he could not stop in time. As expert testimony later explained, the Oakwood Church Crossing was "ultrahazardous": even under the "best case situation" Mr. Shanklin "literally had three seconds of time from when the train came into view before the collision, and it takes 3.4 seconds for a motorist to be able to react and brake under those conditions." JA 75-76. Mr. Shanklin was killed when the train struck his car broadside, shoving it violently more than a thousand feet down the track until the train finally came to a stop.

Eddie Shanklin's widow, Respondent Dedra Shanklin, filed this suit alleging claims under Tennessee common law, including that Petitioner had failed to install adequate warning devices at the crossing. On Petitioner's motion for summary judgment, the district court held that this claim was not preempted by the FRSA. Six years prior to the accident, the State had installed warning signs at the Oakwood Church Crossing and 195 other crossings in a "mop up" effort under its "minimum protection program." JA 106, 133. It is undisputed that nothing beyond the minimum, such as automatic gates and lights, was present at the crossing. (As explained *infra* at 20-22, even one of the required minimum protections – advance pavement markings – had not been requested for, or installed at, the crossing.)

As noted *supra*, the minimum protection program does not involve any determination that passive warning devices are adequate to protect a crossing. The district court therefore held that Ms. Shanklin's inadequate warning claim is not preempted because "[a]lthough authorization for the expenditure was given by the FHWA, there is no evidence in the record that there were specific determinations that such passive warning devices were adequate for particular crossings." Cert. App. 34a.

Moreover, the district court explained that the crossing was characterized by a variety of hazardous conditions: "high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing." Cert. App. 35a. Under 23 C.F.R. § 646.214(b)(3), the FHWA could not approve crossbucks as "adequate" in these circumstances without a recommendation to that effect by a diagnostic team that had studied the crossing. The district court accordingly explained that preemption could not apply: "As no diagnostic recommendation was made, there was no basis for FHWA approval or disapproval." Cert. App. 36a.

After the close of evidence at trial, the judge instructed the jury that, as a matter of Tennessee law:

> It's the duty of a railroad company to exercise reasonable care at public highway crossings to warn and to avoid injury to persons traveling upon the highway and crossing the railroad tracks. The amount of caution required by a railroad company in the exercise of reasonable care must be commensurate with the hazards and dangers that are apparent to it or that would be apparent to a reasonably prudent person

under circumstances similar to those shown by the evidence.

JA 53. The judge specifically instructed the jury regarding the implications of this duty on the railroad's responsibilities to provide warnings. Under Tennessee law, "Reasonable care and common prudence may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." *Id.* at 55.

The jury returned a verdict for Ms. Shanklin. It found Norfolk Southern 70 per cent responsible for Eddie Shanklin's death, with the remaining 30 per cent charged to Shanklin, and found that Ms. Shanklin's damages were $615,000. The district court entered judgment for $430,000 based on the jury's allocation of responsibility. Cert. App. 2a.

IV. The Sixth Circuit's Decision

The Sixth Circuit affirmed, rejecting the contention that the FRSA preempts Ms. Shanklin's inadequate warning device claim. The court of appeals noted the split in the lower courts on whether federal approval of funding alone equates with a finding by the federal government that proposed warning devices were "adequate" – what the court termed the "fiction of constructive approval" – thus triggering preemption, Cert. App. 13a, or whether actual compliance with the regulation is also necessary, *i.e.*, "whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)," *id.* The court of appeals took the latter approach and rejected Petitioner's argument that federal approval of funding alone is sufficient to oust state law.

The Sixth Circuit reasoned that a finding of preemption

based on approval of federal funding alone would relieve the railroad of responsibility for grade-crossing safety in circumstances in which the federal government has not "assumed responsibility by stepping in and making its own determination" of adequacy at a particular crossing. Cert. App. 16a. Such a result not only would "have the effect of removing the protections of state law from large number of crossings which have not yet been analyzed in accordance with subsections (b)(3) and (4)," but also would be inconsistent with the FRSA's preemption provision and the Act's principal goal of increasing railroad safety by reducing the number of deaths and injuries from accidents. *Id.* at 17a. Finally, the court of appeals concluded that 23 U.S.C. § 409 – which bars discovery or use of certain reports, surveys, schedules, and like documents in state or federal litigation – applies only to certain documents compiled by States and in no way affects the discovery or admissibility of an FHWA approval of the use (or non-use) of warning devices at a particular grade crossing. Cert. App. 20a-22a.

SUMMARY OF ARGUMENT

The record below establishes that federal officials did not determine that the warning devices installed at the Oakwood Church Road crossing were adequate to protect the traveling public. Accordingly, no federal requirement "cover[s] the subject matter" of Petitioner's state law duty to provide adequate warning devices within the meaning of 49 U.S.C. § 20106 and Respondent's state law claim based on breach of that duty is not preempted. The contrary assertion of Petitioner and its *amici* misunderstands the operation of the rail-crossing program involved in this case in two important respects.

First, no matter whether the federal standards applicable to this crossing have preemptive effect, those standards *weren't*

complied with: federal regulations require that the Oakwood Church Road crossing be protected by a specific type of warning device – pavement markings – that was not present. Second, neither Tennessee nor the federal government determined that the crossing would be adequately protected by the warning devices that were installed. This case involves a "minimum protection program" that used federal funds to install, without regard to adequacy, passive warning devices as a minimum safety measure for all crossings around the country. The "diagnostic team" required by federal regulations never considered whether the minimum protection devices were adequate to protect the public. Instead, the federal government merely authorized the release of funds in an urgent effort to bring crossings up to a minimum standard, never intending to supplant railroads' state-law obligations to install "adequate" warnings. It is only once the devices chosen through a diagnostic team study and paid for with federal funds are installed and functioning properly that the railroad's state law duty is preempted by federal law.

A finding of preemption on these facts would have devastating consequences for safety. Petitioner has acknowledged that it "consistently has had the highest number of crossing accidents and the worst rate of such incidents among major railroads." JA 124. Petitioner nonetheless would have this Court adopt a proposition that railroads are absolved of their settled common law duties even when a crossing is not protected in compliance with federal minimum safety standards. Petitioner's position, if adopted by this Court, would allow railroads to shirk their duty to protect the traveling public at tens of thousands of crossings at which no official, federal or state, has determined that the existing warning devices are adequate. In fact, because on Petitioner's view the federal government would have preempted all state law obligations at such crossings, States could not even *regulate* the crossings to

require further protection. Congress, which enacted the Federal Rail Safety Act to reduce dangers at grade-crossings, could never have intended such a result. This Court accordingly should affirm the Sixth Circuit's judgment.

ARGUMENT

I. Introduction – Basic Preemption Principles

Several important aspects of this Court's Supremacy Clause jurisprudence converge in this case. First, despite the supremacy of federal law and the importance of interpreting a statute's preemptive scope according to its text and structure, *Easterwood*, 507 U.S. at 664, a party asserting preemption of state law bears a heavy burden. Thus, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). Put differently, "[p]reemption of state law by federal * * * regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963)). This clear statement rule "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).

Second, the presumption against preemption is even stronger when, as in this case, "Congress [has] legislated * * * in a field which the States have traditionally occupied, [involving] the historic police powers of the States." *Rice* v.

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484-86 (1996). This tenet was forcefully advanced by the *Easterwood* majority both in its narrow construction of the FRSA's preemption provision, 507 U.S. at 665, and in its rejection of the railroad's particular preemption arguments concerning the plaintiff's adequate warning claim, *id.* at 664, 668; *see also id.* at 679 (Thomas, J., joined by Souter, J., concurring in part and dissenting in part) (relying on presumption against preemption to reject preemption of excessive speed claim).[3]

Third, in this case (as in *Easterwood*), where the FRSA's allegedly preemptive scheme does not itself provide a damages remedy, the Court has ascribed preemptive intent to Congress only in the most compelling circumstances. *See English* v. *General Electric Co.*, 496 U.S. 72, 87-90 (1990); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

The foregoing anti-preemption precepts are not mere

[3] Particularly in light of *Easterwood*'s express invocation of the "presumption against pre-emption," 507 U.S. at 668, the argument put forth by *amicus* Product Liability Advisory Counsel that the presumption does not apply in express preemption cases is, charitably put, misleading. *See* PLAC Br. 3-12. This Court has repeatedly made clear that the presumption applies just as forcefully where the question presented is the scope, rather than the existence, of preemption, and accordingly has invoked the presumption in almost every recent express preemption case. *See Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484-85 (1996) (explicitly rejecting argument that presumption does not apply in express preemption cases); *see also, e.g., New York Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516, 518 (1992) (majority opinion); *id.* at 532-33 (separate opinion); *cf. U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 871 n.12 (1995) (Thomas, J., joined by Rehnquist, C.J., O'Connor, J., and Scalia, J., dissenting).

precedential idiosyncrasies, but are deeply embedded in the "federal-state balance" that was fundamental to the constitutional plan. *Hillsborough County, Fla.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 717-19 (1984); *Rath Packing Co.*, 430 U.S. at 525. This Court's Supremacy Clause jurisprudence thus is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). "[R]equiring that Congress speak clearly will help ensure that its decision to preempt is the product of a deliberate policy choice. Our system of federalism demands that interference with states' policy decisions to give their citizens tort remedies should be the product of judgment and careful balancing, rather than an unintended result of congressional inattention or imprecision." Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. Rev. 559, 627 (1997).

In this regard, the presumption against preemption works in tandem with an analogous subject of this Court's federalism jurisprudence, the Eleventh Amendment, which provides that States are immune from suit in federal court. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). Congress may override that judgment, pursuant to its legislative powers under the Fourteenth Amendment, *see Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), but the Court has insisted that Congress do so in unmistakably clear terms and has enforced that edict very strictly, *see, e.g., Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-46 (1985). Because the same principles of federalism that support the Court's Eleventh Amendment jurisprudence also undergird Supremacy Clause jurisprudence, the plain-statement rule should be just as stringently enforced in the preemption context as it is in the Eleventh Amendment context. *See Gregory*, 501 U.S. at 460-67; *Wisconsin Public Intervenor*

v. *Mortier*, 501 U.S. 597, 607-09 (1991); *accord Cipollone*, 505 U.S. at 533 n.1 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) (suggesting identity of Eleventh Amendment plain-statement rule and "clear and manifest" preemption standard).

II. Petitioner Cannot Prevail Under Any Theory Of Preemption Because Federally Required Warning Devices Were Not Installed At The Oakwood Church Crossing.

Even under Petitioner's own theory of preemption, it cannot prevail on the facts of this case. As Petitioner acknowledges, the FHWA has provided that "States '*must employ* devices that conform to standards set out in [the MUTCD].'" Pet. Br. 14-15 (quoting *Easterwood*, 507 U.S. at 667) (emphasis in Pet. Br.). The speed limit on the Oakwood Church Road is 55 miles per hour. JA 54. The MUTCD requires that all crossings on roads with speed limits of 55 and above be protected by pavement markings. MUTCD at 8 B-4. Pavement markings, however, *were not present* at the Oakwood Church Crossing. Instead, as Petitioner explains, the State "installed reflectorized crossbucks and three advanced warning signs," not pavement markings. Pet. Br. 20 (citing JA 103-04, 128). Tennessee's request to the federal government for funding for warning devices at the Oakwood Church Crossing omits any request for funds to install pavement markings. JA 134 (line 8). This omission is particularly noteworthy because, according to trial testimony that Petitioner embraces, Tennessee determined that all crossings in the state must be protected by "two reflectorized crossbucks, two advanced warning signs *and two advanced pavement markings* at each crossing, if the road would take it." JA 102-03 (emphasis added); Pet. Br. 20; *see also* JA 93 (testimony confirming that MUTCD "has the force

of regulation in the State of Tennessee"); *id.* at 132 (report stating that project encompassed installation of "signs & *pavement markings* at 196 off-system railroad crossings" (emphasis added)). The Oakwood Church Road is paved, not a gravel road on which pavement markings could not be painted. JA 135.

Petitioner claims that the failure to install pavement markings at the Oakwood Church Crossing "shows that, despite the numerous crossings in the federally funded project, due attention was given by the governmental authorities to the upgrade needs of each individual crossing." Pet. Br. 20. The MUTCD, however, does not permit a deviation from the installation of pavement markings on such a road. Nor does Tennessee. To the contrary, the engineer in charge of the State's crossing program testified that an across-the-board standard applied, and also that the individuals who installed the safety devices had no experience in making railroad safety judgments. JA 105, 106. They accordingly could not give any attention, much less "due attention," to the needs of the Oakwood Church Crossing.

Petitioner fails to explain on what possible theory it can prevail in this case, given that the warning devices at the crossing did not comply with the minimum safety standards of the federal government. Indeed its substantive arguments show that it cannot prevail. Petitioner's position is that federal standards determine what warning devices are adequate for each crossing and accordingly preempt state law duties. Pet. Br. 25-26. But those standards weren't complied with here. Petitioner also argues that FHWA has designated the State of Tennessee as its agent for purposes of determining what warning devices are adequate at rail crossings in the State. *Id.* at 33-42. Although that is not correct, *see infra* at 42-43, even if it were, Petitioner could not prevail because this crossing was

not protected by the warning devices mandated by state policy.

Finding preemption in these extraordinary circumstances would have devastating consequences for rail safety because the mere *existence* of federal or state safety standards would be enough to trump railroads' obligations to maintain safe crossings, even when those minimum standards are not *implemented*. No one would be responsible for ensuring that the crossing was safe. *Easterwood* rejected such a result in refusing to find preemption, notwithstanding that Georgia had requested funds in compliance with federal regulations and FHWA had issued the funds, because the State ultimately failed to install the devices authorized by the federal government. 507 U.S. at 671-72.

III. The Mere "Applicability" Of Federal Regulations Governing Warning Devices Does Not Trigger Preemption.

A. Preemption Applies Under *Easterwood* Only If The Federal Government Determined That The Warning Devices In Question Were Adequate.

Petitioner's argument that, under *Easterwood*, Respondent's claim is preempted by the mere "applicability" of 23 C.F.R. § 646.214(b) is incorrect because *Easterwood*'s analysis of 23 C.F.R. § 646.214(b) is inapposite to minimum protection programs. *Easterwood* never stated or suggested that federal funding was both a necessary and a sufficient condition for finding preemption in any, let alone all, circumstances. *Easterwood* involved Georgia's decision, pursuant to the *hazard* rating required by 23 C.F.R. Part 924, to upgrade the warning devices at a crossing to include flashing lights and automatic gates. The minimum protection program

was not involved in *Easterwood* and, in fact, none of the parties or *amici* in *Easterwood* advised the Court that the minimum protection program even existed.

Nor does *Easterwood*'s rationale support Petitioner's view. The federal regulation invoked by Petitioner, 23 C.F.R. § 646.214(b)(3) & (4), was "applicable" to the State's request for funds in *Easterwood* in the sense that the regulation governed the State's request for funds, as well as the federal government's approval of those funds. It was only the subsequent decision by the State to spend the funds on other devices that rendered the regulation "inapplicable." This Court found the plaintiff's claim was not preempted because devices approved by the federal government as adequate to protect the crossing had not been installed. That conclusion was sound because, as Respondent explains, *infra* at 28-29, 35; under the hazard program the federal government *does* in fact use a diagnostic team to determine whether warning devices are adequate before providing funding. *Easterwood* thus explains that preemption arises when the federal government "displace[s] state and private decision-making authority." 507 U.S. at 670. By contrast, if the federal government merely authorizes the release of federal funds, without any assessment of the adequacy of the devices to be installed, "state and private decision-making authority" obviously remain unaffected.

Nor, as *Easterwood* requires in order to find preemption, does the minimum protection program "set the terms under which railroads are to participate in the improvement of [their] crossings." *Id.*. Railroads remain free to install additional warning devices, as the testimony in this case demonstrates. The engineer charged with administering the State's program testified that he would have approved a request by Petitioner to upgrade the Oakwood Church Crossing with its own funds "in a heartbeat." JA 109. Another expert

witness confirmed in response to the same question that "[t]he state will accept candidates that are not on their priority list if they're paid for with other funds than what the state has to pay." *Id.* at 97.[4]

In the terms of the FRSA's preemption provision as interpreted in *Easterwood*, federal regulations "substantially subsume" the subject of Petitioner's state law duty to provide *adequate* warnings at each crossing only if the federal government determined that the crossbucks installed under the minimum protection program were, in fact, *adequate*. If, on the other hand, the federal government provided only "minimum" protection, Petitioner is not excused from its state law duty, which goes well beyond such minimal measures. It "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." JA 55 (jury instruction). In particular, it is not enough for the railroad to adopt a minimum standard that does not vary with the circumstances. "The amount of caution required by a railroad company in the exercise of reasonable care must be commensurate with the hazards and dangers that are apparent to it or that would be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence." *Id.* at 53. As Chief Judge Posner aptly explained in *Shots* v. *CSX Transportation*, 38 F.3d 304, 308 (7th Cir. 1994), "[m]inimum is not a synonym

[4] Although Petitioner would have had to obtain State approval to upgrade the crossing, that is a matter of state law not federal preemption. In any event, under Tennessee law, "[i]rrespective of a state or local government's authority to place safety devices at a grade crossing, this allocation of authority does not relieve the railroads of their duty to take all reasonable precautions to maintain grade crossing safety." JA 56 (jury instructions).

for optimum, or even adequate." [5]

Petitioner's argument that the mere "applicability" of the federal regulations automatically preempts state law, *see* Pet. Br. 25-30, therefore begs the only relevant question: Did the FHWA in practice make a determination of adequacy in issuing federal funds under the minimum protection program, as it did under the hazard program? If FHWA did not believe it was obligated – and it is not so obligated – under the minimum protection program to determine whether crossbucks were adequate to protect particular crossings, "the Secretary of Transportation [has not] prescribe[d] a regulation or issue[d] an order covering the subject matter of the State requirement." 49 U.S.C. § 20106.

B. Petitioner's View Would Seriously Undermine Safety, Contrary To Congress' Intent.

To hold that preemption applies even if the FHWA did not make a determination of adequacy would, as the Sixth Circuit correctly concluded, absolve railroads of their common law duties contrary to the FRSA's express purpose "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents," 49 U.S.C. § 20101. Since 1973, the FHWA has issued funds for tens of thousands of crossings under the minimum protection program. If the FHWA did not *actually* conclude that the installation of those crossbucks was adequate to protect the crossings, then it is only common law duties that ensure that railroads will act to protect

[5] Because this common law duty of railroads is an important means of ensuring rail safety, Petitioner is wrong to assert that reductions in rail-crossing fatalities are attributable solely to federal funding for crossing upgrades. Pet. Br. 19.

the traveling public at those crossings. Otherwise, "no one is responsible for the safety of the motorists who use the crossing." Cert. App. 16a.

A finding of preemption would be particularly inappropriate in light of the fact that in response to *Easterwood*, and at the behest of the railroad industry, the Department of Transportation proposed regulations intended to preempt all such claims. *See* Selection and Installation of Grade Crossing Warning Systems; Notice of Proposed Rulemaking, 60 Fed. Reg. 11649 (Mar. 2, 1995). In promulgating the regulation, the Secretary recognized that state law "impose[s] a tort law duty upon railroads to maintain safe crossings," including in some cases "a duty to select and install warning systems at hazardous crossings." *Id.* at 11651. The Secretary proposed, however, to impose on railroads an affirmative federal duty to report conditions at all crossings, *see id.* at 11652 (discussing proposed 49 C.F.R. § 234.301), a requirement that would "'substantially subsume' the subject matter of railroads' selection and installation of highway rail grade crossing warning systems and as such [would] preempt state laws covering the same subject matter, regardless of whether Federal funding of improvements is involved at a particular crossing," *id.* at 11651.

After public comment, however, the Secretary *withdrew the proposed regulation*. *See* Selection and Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42733 (Aug. 8, 1997). Although also critical of comments made in opposition to the proposed regulation, the Secretary recognized that "[a]bsent from virtually all rule comments and testimony * * * were data supporting the conclusions drawn from the rule." *Id.* at 42734. Among other things, the Secretary recognized that the assertion that railroads would retain "powerful incentives to continue" funding

crossing improvements in a regime in which state tort law was preempted had been supported by "only conclusory comments rather than data on past, present or projected levels of participation." *Id.* The Secretary accordingly withdrew the proposal "in light of the lack of supporting hard data in the record," concluding that "*railroad safety will not be best served*" by preempting state law claims. *Id.* at 42733 (emphasis added).

Petitioner nonetheless maintains in this Court that railroads may not be sued for installing inadequate warning devices at any of the tens of thousands of crossings at which federal funds paid for the installation of crossbucks. It would be extraordinary for this Court to find such claims preempted when the Secretary has stated that they remain available under state law and has concluded, as a policy matter, that they should not be preempted. *See Hillsborough County*, 471 U.S. at 714-15 (citing *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984)) (federal agency's view, expressed in a single sentence in regulatory preamble, that state law was not preempted by federal regulations held "dispositive"); *see also Medtronic*, 518 U.S. at 496-97, 98-99 (according substantial weight to agency's views on preemptive scope of governing statute); *id.* at 505-06 (Breyer, J., concurring) (same). Moreover, even the Secretary's proposal would have imposed on the railroads a federal duty to report crossing conditions, while Petitioner's argument in this Court would not impose even that obligation.

Four further points illustrate that finding preemption based merely on the approval of federal funding would have terrible implications for safety, which Congress did not intend. First, Petitioner's view would interfere with the hazard program established by Congress under 23 U.S.C. § 130(d). According to Petitioner, the federal government has determined that every

crossing protected under the "minimum protection program" has adequate protection. On that logic, given that "adequate" protection already exists, none of the tens of thousands of crossings funded under the minimum protection program ever would be upgraded with further protection through the installation of advanced warning devices. But Congress contemplated to the contrary in establishing the hazard program under 23 U.S.C. § 130(d) and in later years continuing to appropriate funds for crossing improvements. *See, e.g.*, U.S. Department of Transportation, *FHA Notice* (Mar. 20, 1973) ("the purpose of this notice is to encourage increased use of automatic gates at railway-highway grade crossings") (lodged with this Court).

Second, Petitioner's view would preclude State regulatory agencies from determining that crossings improved under the "minimum protection program" required still further protection. Petitioner therefore has it precisely backwards in suggesting that state agencies will ensure that adequate protection is provided. Pet. Br. 40. Preemption applies not only to state common law claims but to any state "law, regulation, or order related to railroad safety." 49 U.S.C. § 20106. As Chief Judge Posner has explained:

> Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings covered by the agreement, or *otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings*, when no one in the federal government had made a determination that the improvements to

> be made would bring all the crossings up to a level of safety adequate to satisfy federal standards.

Shots, 38 F.3d at 309 (emphasis added). To strip States of the ability to protect their citizens through state law in this manner, without any corresponding determination of safety by the federal government, would run contrary to the settled presumption against preemption and this Court's repeated recognition of States' powers as sovereigns. *Accord* DOT Analysis at A31 (confirming that States can "legally and constitutionally require the railroads to bear the entire responsibility" for the costs of crossing improvements) (citing *Atchison, Topeka & Santa Fe Ry. Co v. Public Utility Comm'n..*, 346 U.S. 346, 352 (1953). Petitioner, in fact, trumpets its view that Tennessee has gone beyond the federal minimum standard, an approach which (whether or not true) would be impossible under Petitioner's view of preemption.

Third, the installation of warning devices can be a slow process. After a State applies for and obtains federal funding to upgrade warning devices at a crossing, it may take years for the railroad to respond to the state's request for a proposed budget and to complete the construction. If preemption arises from the mere "applicability" of federal regulations, as opposed to actual installation of warning devices protecting the crossing, then railroads are relieved of their common law duties to protect the public before there is any corresponding safety benefit. *Easterwood* requires more, holding that preemption does not apply, and that railroads must comply with common law duties, until devices required by federal regulations and approved by the federal government as adequate under the circumstances are actually installed and operating. The Sixth Circuit correctly followed this precept when it rejected Petitioner's argument that preemption followed from the mere

approval of federal funding.

Fourth, the conditions at many railroad crossings change over time. For example, a crossing initially characterized by low traffic volumes and sufficient "sight distances" (*i.e.*, an ability for a motorist to see a train far down the track) may later become heavily traveled and may become overgrown with vegetation. U.S. Department of Transportation, *FHA Instruction Manual 21-1-68* (Jan. 5, 1968) (lodged with this Court). If the mere federal funding of crossbucks is deemed to preempt state law, then the railroad will assert that it has no common law duties at the crossing and therefore no obligation to install more advanced warnings notwithstanding changed conditions. That was precisely the position taken by the railroad, and accepted by the Eighth Circuit, in *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923-24 (1999), *pet. for cert. pending*, No. 99-538. Under *Easterwood*, by contrast, preemption arises only when the FHWA determines that lights and gates – the most advanced warning devices that the federal government funds – or their equivalent are installed, providing protection for the crossing even under changed conditions.

IV. The Federal Government Did Not Make A Determination Of Adequacy Here Under The Minimum Protection Program.

The warning devices in this case were installed under Tennessee's minimum protection program. JA 103, 104, 133 (project documents confirming the purpose of the project was "Installations of Minimum Protection"). The state official responsible for crossing safety specifically confirmed that the "minimum protection" and hazard programs are two separate programs. JA 98. Petitioner acknowledges this point, Pet. Br. 20, yet rests its arguments entirely on FHWA's approval of adequate warning devices under the hazard program,

notwithstanding the unequivocal proof at trial that the hazard and minimum protection programs are "not in any way connected," JA 105.[6]

The uncontradicted record below, the unambiguous position of FHWA, and the clear mandates of federal law all establish that federal funding for the minimum protection program, unlike the hazard program, was *not* tantamount to a determination that those crossings were adequately protected. Instead, the minimum protection program was aptly named: It was created to ensure that every crossing in the country, without regard to individual conditions, was protected at a minimum by a standard crossbuck on each side of the tracks.

In determining whether a crossing should be included in the program, the only relevant consideration was whether the crossing already had "minimum" protection, *i.e.*, in Tennessee, whether it already had "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would take it." JA 102-03; *see also* JA 102 (testimony of state official that "we were to put, at a minimum protection, a sign protection [sic] at crossings"). The engineer in charge of the Tennessee program confirmed at trial that "the people that actually went out to do the signing were design engineers *with no railroad experience*." *Id.* at 106 (emphasis added). Instead, the State was merely "[m]aking sure that everything has *some kind of protection*." *Id.* (emphasis added).

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[6] The Association of American Railroads thus is flatly wrong when it asserts, without any citation to the record, that "[i]n this case, the crossing was improved with passive warning devices using federal funds–as have thousands of crossings characterized by low traffic volumes–in accordance with the ranking and priority assigned by the state under the Grade Crossing Program." AAR Br. 6.

The same official also testified that "there was no engineering judgment in the minimum protection program." Depo. of Terry Cantrell, Vol. II, at 8 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59). He continued:

> It was a, you know, program whereby we wanted every crossing, regardless, to have a certain minimum, and possibly some of these crossings were overprotected *and some of them were underprotected*. But there was no engineering judgment either by ourselves or by the design team.

Id. at 9 (emphasis added).

The facts surrounding the installation of minimum protection at the Oakwood Church Crossing fully support that conclusion. The same official confirmed that there was no "actual engineering judgment done by anyone under [his] control in the state of Tennessee that looked at this crossing and said minimum protection will be enough." JA 105. Instead, that Tennessee Department of Transportation merely

> went out there and removed two crossbucks; apparently, because they were substandard or perhaps the deer hunters had used them for targets. I'm not sure why, but–and replaced them with two reflectorized crossbucks. We [also] installed what they call a W10-1 sign on one approach and then two W10-2 signs on State Route 43.

Id. at 103.

In turn, the federal government did not – and indeed *could not* – make a determination that the minimum protection devices provided adequate safety at the Oakwood Church Crossing. The federal government receives information on local crossings from States, and, as noted, Tennessee did not in the course of its minimum protection program send anyone (much less the required diagnostic team) to determine if the protection at particular crossings was adequate, including with respect to the Oakwood Church Crossing. The official in charge of the state crossing program thus testified that the federal government "merely * * * funded[,] funneled it and signed off on it," Dep. of Terry Cantrell, Vol. II, at 9 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59), rather than "making [a] design judgment," and confirmed that the federal government had never "come back and [said] what [the State has done] is anything more than minimum protection that is satisfactory to protect the crossing." *Id.* at 21.

The federal employee charged with reviewing the project, in turn, explicitly confirmed that the federal government "w[as] *not* making a federal decision as to the adequacy or sufficiency of the protection being installed at the crossings." JA 126 (emphasis added). The federal government's "function was not to act as a diagnostic team, * * * and no engineering decision was being made" by the federal government. *Id.* at 125. Instead, the federal government's goal was merely to see if construction "work had been done properly." *Id.* at 126. In fact, it appears that the Oakwood Church Crossing was never even inspected. *Id.* at 115, 126.

Tennessee provided the federal government with almost no information about the Oakwood Church Crossing, precisely for the reason that the State was seeking to install only minimum protection. The request for approval submitted by

Tennessee, which included a single line item about each of the 196 crossings in the project, states only that the Oakwood Church Crossing has one main line track and no other tracks, and lists various "approach distances" to the crossing. JA 134. Missing from the State's information is any discussion of the *conditions* at the crossing, such as the speed of train traffic, the volume of traffic, whether hazardous materials traveled on the road or rail, the obstructions to view caused by surrounding vegetation and buildings, or the frequency with which trains travel on the track – precisely the conditions that led the jury to conclude that Petitioner had violated its state-law duty of care.

These circumstances are readily contrasted with the evaluation of conditions under States' hazard programs, such as occurred in *Easterwood*. When a State seeks federal funding to upgrade a crossing under the hazard program, it dispatches an expert "diagnostic" team to study conditions at the crossing and to determine what devices should be installed. When certain conditions set forth in 23 C.F.R. § 646.214(b)(3)(i) are present, flashing lights and lowering gates presumptively must be installed. These conditions include "[h]igh [s]peed train operation," a "combination of high speeds and moderately high volumes of highway and railroad traffic," "unusually restricted sight distance," and "continuing accident occurrences." *Id.* If such conditions exist, and "a diagnostic team justifies that gates are not appropriate, FHWA may find that the[se] requirements are not applicable." *Id.*

Tennessee specifically has surveyed the crossings in the State under its hazard program, and has compiled the list contemplated by 23 C.F.R. Part 924. *See* Pet. Br. 19 (citing JA 99-100). The survey considers, among other things, the "number of trains a day," the "amount of the traffic," the "percent of [traffic that is] trucks," "what type [of road] it is," the number of "lanes of traffic," "accident history," and

whether the road is "paved or not paved." JA 100. For those crossings that the State determines are the highest priority for the installation of advanced warning devices with federal funds, a diagnostic team studies the crossing and determines which warning devices are appropriate. Pet. Br. 19 (citing JA 100-01).

But none of the data required under the hazard program is collected or analyzed under the *minimum protection program*. The engineer in charge of the Tennessee program confirmed that under the minimum protection program the State *did not* "take into account any of the factors that [it is] required to look at in the priority [hazard] program, such as number of trains a day, speed of trains, maximum timetable speed, truck traffic, hazardous materials, year of last upgrading, the accident history, [or] obstructions to view." Depo. of Terry Cantrell, Vol. II, at 8 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59). Petitioner thus errs in invoking Section 130(d) as envisioning "a system in which the selection of warning devices at crossings would be based on expert technical determinations and extensive data analyses," Pet. Br. 13, 17-18, when that system of indices and diagnostic teams applies to the separate *hazard* program, not the minimum protection program. The five States supporting Petitioner accordingly make an important concession when they acknowledge that "[i]n any given year, a significant number of railroad crossings are not selected [for improvement under the hazard program] and *continue to be maintained by the railroads*." Five States Br. 10 n.6 (emphasis added). The Oakwood Church Crossing was precisely such a crossing because it was never improved under the hazard program. The federal government therefore never supplanted railroad decisionmaking regarding the crossing and Petitioner remained obligated under the common law to provide adequate warning

devices.[7]

In fact, if the federal and state governments had known about the conditions at the Oakwood Church Crossing, they certainly would not have concluded that passive warning devices were adequate. Trial testimony established that a number of hazardous conditions existed at the Oakwood Church Crossing requiring the installation of advance warning devices, including "high speed train operations combined with limited sight distances, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing." Cert. App. 35a. The district court specifically found that the conditions set forth in 23 C.F.R. § 646.214(b)(3) existed at the crossing, requiring the use of lights and gates absent a contrary recommendation by a diagnostic team. Cert. App. 36a. But such active warning devices were not installed despite the absence of any study or recommendation by a diagnostic team.[8]

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[7] *Amicus* AAR buttresses this point when it explains that "[a] *key aspect* of the [hazard] Program is the requirement that in prioritizing crossing improvement projects, states must consider * * * accident *potential*," AAR Br. 20 (first emphasis added), a determination that unquestionably was not made with respect to the minimum protection devices at the Oakwood Church Crossing.

[8] Because no State or federal official considered whether the warning devices are adequate, *amicus* AAR is simply wrong when it asserts that "[w]hether or not such conditions exist at a crossing, warranting active warning devices, is a determination made by the traffic engineering officials at the time of the federally funded project, which may not be second guessed by a jury." AAR Br. 20. The engineer in charge of Tennessee's crossing program specifically testified, regarding the application of the minimum protection program to the Oakwood Church Crossing, that "[t]he State has *no responsibility*. The program as such is a supplement to the

(continued...)

V. The FHWA Was Not Required To Make A Determination Of Adequacy Under The Minimum Protection Program.

Respondent has explained above that the only relevant question for this Court to resolve is whether the federal government, in implementing the minimum protection program, made a determination that the warning devices in this case were adequate under the circumstances. Only if such a determination were made could the federal program be said to have "substantially subsume[d]" Petitioner's state law duty of care to provide adequate warnings. Because no diagnostic team studies crossings under the minimum protection program, no such determination of adequacy is made. Petitioner's argument that FHWA *should have* made a determination of adequacy under various provisions of federal law, Pet. Br. 26-28, accordingly is not relevant. In any event, as we now show, Petitioner's construction of various federal regulations to impose such a duty on FHWA is erroneous.

23 C.F.R. § 646.214. Petitioner misunderstands the relationship between the minimum protection mandate of 23 U.S.C. § 130(d) and FHWA's regulations at 23 C.F.R. § 646.214(b). Congress mandated that in order to receive federal funds States must "[a]t a minimum * * * provide signs for all railway-highway crossings." 23 U.S.C. § 130(d). FHWA implemented that mandate in 23 C.F.R. § 646.214(b)(1), which provides that "[a]ll traffic control devices proposed shall comply with the [MUTCD] supplemented to the extent

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[8](...continued)
individual municipalities, counties and cities, *and railroads*." Depo. of Terry Cantrell, Vol. II, at 17 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59) (emphasis added).

applicable by State standards." In fact, Petitioner's view of preemption conflicts with this Court's holding in *Easterwood* that subsection (b)(1) does not preempt state law. 507 U.S. at 670. Petitioner maintains that federal *funding* for crossbucks preempts state law when this Court already has concluded that the more stringent *mandate* that such crossbucks be installed has no such preemptive effect.

A separate provision invoked by Petitioner, 23 C.F.R. § 646.214(b)(3), is not applicable to the minimum protection program. That provision simply *defines* "adequate warning devices." *Compare, e.g.*, 23 C.F.R. § 646.214(b)(2) (mandating use of "adequate warning devices" on federal highway construction). Subsection (b)(3) is not applicable to the "minimum protection program" because, as described above, FHWA does not make a determination of adequacy under that program, and specifically does not evaluate crossings "[i]n individual cases" and with "diagnostic teams" as subsection (b)(3) contemplates. Nor could it: Congress required the installation of minimum protection devices in all States receiving federal funds, depriving FHWA of any discretion to limit the scope of the program. Subsection (b)(3) applied in *Easterwood*, by contrast, because that case involved the analysis of a particular crossing under the hazard program, which requires a determination of adequacy by FHWA.

Nor is subsection (b)(4) applicable. On its face, that provision applies only to individualized determinations by "a State regulatory agency, State highway agency, and/or the railroad" regarding the warning devices to be installed at a crossing, not Congress' implementation of the broad "minimum protection" mandate. Moreover, subsection (b)(4) is triggered only when a diagnostic team's recommendation "justifies" to FHWA that lights and gates are not required at a particular crossing, which as noted is a process that does not occur under

the minimum protection program. *See* 23 C.F.R. § 646.214(b)(3)(ii) ("In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements *are not applicable*" (emphasis added)); *id.* § 646.214(b)(4) ("For crossings where the requirements of § 646.214(b)(3) *are not applicable*, the type of warning device to be installed * * * is subject to the approval of FHWA." (emphasis added)). But even if subsection (b)(4) applied, it would give FHWA authority only over "the *type* of warning device to be installed" (emphasis added), rather than mandating the installation of "adequate warning devices."

23 U.S.C. § 109(e). FHWA is not required to determine the "adequacy" of warning devices under the minimum protection program by 23 U.S.C. § 109(e). Petitioner had relied heavily on Section 109(e) in seeking certiorari, Pet. for Cert. 12, 19, but now apparently recognizes that argument was erroneous. Section 109(e) expressly applies only to "Federal-aid highway[s]," not local roads such as in this case. *See also* 23 U.S.C.A. § 101(a) (1990) (defining "Federal-aid highways" at the time the devices were installed in this case to mean "highways located on one of the Federal-aid systems"). In fact, the Petition for Certiorari and the merits briefs of Petitioner's *amici* invoke Section 109(e) only by conspicuously omitting the language limiting the statute to "Federal-aid highways." Pet. Cert. 19; Five States Br. 14; PLAC Br. 17; AAR Br. 23.[9]

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[9] Several other facts confirm that Section 109(e) is inapposite. Congress enacted a statute that subjected non-federal-highway construction to Section 109 (although not necessarily Section 109(e) specifically) in 1976, but repealed that statute in 1978. Pet. Br. 10-11 n.7. In addition, a regulation on which Petitioner principally relies, 23 C.F.R. § 646.214(b)(3)(i), expressly distinguishes between federal-aid highways and other federally funded projects.

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Petitioner's extensive discussion of Section 109(e) as proof that "Congress has always acted to ensure that warning devices are adequate when federal highway funds are involved in a grade-crossing project," Pet. Br. at 6-7, therefore proves precisely the opposite point. In fact, Congress' mandate that nothing less than "adequate" warning devices may be installed on federal highway projects, 23 U.S.C. § 109(e), readily contrasts with the application of the "minimum protection program" to a non-federal road such as that in this case. Rather than requiring in 29 U.S.C. § 130(d) that crossbucks would be installed only where adequate, Congress mandated that they be installed "[a]t a minimum" without regard to the circumstances. The more stringent mandate of Section 109(e) makes perfect sense, as it is not surprising that Congress would adopt a *per se* rule that all federal, as opposed to state, highway construction provide adequate warning to the traveling public.

23 C.F.R. Part 924. Finally, Petitioner's suggestion that preemption arises from States' efforts to prioritize their crossing improvements as required by 23 C.F.R. Part 924 was flatly rejected in *Easterwood*. Part 924, this Court explained, is simply a "federal effort to encourage the States to rationalize their decisionmaking" with respect to spending federal funds. 507 U.S. at 667. The same conclusion applies here because the federal government restricted only Tennessee's use of federal

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[9](...continued)

Other regulations cited by Petitioner's *amici* as supposedly requiring compliance with Section 109(e), *e.g.*, 23 C.F.R. §§ 646.201-.205, do not reference that statute at all. In addition, 23 C.F.R. § 630.106(a) and its predecessor require compliance with only "applicable" federal law. *See* Pet. Br. 16 n.10 (acknowledging that predecessor to § 630.106(a) had same meaning as current version). Because Section 109(e) expressly is limited to "federal-aid highways," it is not "applicable" to local roads such as the one on which Eddie Shanklin was killed in this case.

funds, not any attempt by Petitioner or the State to improve the crossing with their own money.

Nor is Petitioner correct to suggest that preemption arises because the State *may* have determined through the hazard program that the Oakwood Church Crossing did not require further protection. Petitioner presented no evidence to support such an assertion and accepting Petitioner's claim would impose preemption at every public crossing in America, all of which are included on States' hazard indices. Moreover, Petitioner's argument is simply a variation on the claim rejected in *Easterwood*: The most that can be said is that Tennessee *may* have decided not to spend federal funds on the crossing, which does not give rise to preemption. In particular, any such decision by Tennessee could just as easily have been based on the fact that federal funding was not available to upgrade the crossing, not on a judgment that the crossing was safe.

VI. Any Determination Of Adequacy Must Be Made By The Federal, Not State, Government.

Petitioner argues that requiring the federal government, rather than States, to evaluate the adequacy of crossings would be too burdensome. For the two reasons described above, Respondent's point is irrelevant to this case as a factual matter: (i) the federal government does not require a determination, whether by FHWA or any other entity, that the warning devices installed under the minimum protection program are adequate; and (ii) as a factual matter, States do not make such a determination. But Respondent's legal argument that preemption could arise from such a State determination is flawed in any event because it conflicts with 23 C.F.R. § 646.214 and *Easterwood*.

Subsection 646.214 explicitly requires "*FHWA*" to make any determination that lights and gates are not required under subsection (b)(3) and, when subsection (b)(3) is "not applicable," provides that "the type of warning device to be installed * * * is subject to the approval of *FHWA*." 23 C.F.R. § 646.214(b)(3)(ii), .214(b)(4) (emphasis added). Petitioner itself acknowledges that subsection (b)(3) "expressly requires *an FHWA determination* if the state highway agency seeks a waiver of the automatic-gate requirement." Pet. Br. 32 (emphasis added). Moreover, in *Easterwood*, it was the *State* that ultimately determined not to install lights and gates after the federal government had authorized the requested funding. This Court nonetheless held the plaintiff's claim not preempted.

The five States supporting Petitioner point out that Congress has authorized FHWA to enter into express agreements delegating its authority to the States, but acknowledge that no such agreement governs this case. Five States Br. 13 n.8. For its part, Petitioner errs in relying on the FHWA's practice, prior to adoption of the Highway Safety Act of 1973, of deferring to state-agency determinations of the adequacy of warning conditions, Pet. Br. 36-38, since FHWA ceased its deferential practice after adoption of the 1973 Act, *id.* at 38 n.19 (acknowledging that PPM 21-10 was superceded upon adoption of regulations implementing the 1973 Act). Accordingly, there is no basis for this Court to deputize Tennessee as the federal government's agent when FHWA itself has not done so.

VII. A Federal Statute Governing The Discovery And Admissibility Of Certain Evidence Is Irrelevant.

Petitioner makes the back-door assertion that Ms. Shanklin's claim is preempted because 23 U.S.C. § 409 allegedly makes it impossible to shoulder the evidentiary

"burden" placed on it by the court of appeals. Under Section 409, "reports, surveys, schedules, lists, or data compiled or collected" pursuant to certain provisions of the FRSA or for the purpose of developing a federally-funded highway improvement project may not be considered in federal or state court actions arising from an occurrence at a location mentioned in such documents.

In the first place, the proper construction of Section 409 is irrelevant to this case. Even under Petitioner's reading of Section 409, the statute is implicated only if documents exist confirming that warning devices installed with federal funds were adequate to protect the affected crossings. That certainly is not true with respect to the minimum protection program. As described above, neither the States nor the federal government considered whether devices installed under the minimum protection program would be adequate to protect the public under the circumstances. Thus, no documents exist that could be subject to Section 409 and this Court need not resolve the statute's proper construction.

Even if Section 409 were relevant, it would provide no obstacle to a proper inquiry into preemption. As the Sixth Circuit explained, to gain preemption, Petitioner would have to show "whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to" 23 C.F.R. 646.214(b)(3) "or that only passive warnings were needed pursuant to" 23 C.F.R. 646.214(b)(4). Cert. App. 13a. This determination could take the form of a free-standing FHWA letter or form, without requiring judicial consideration of reports or data referred to in Section 409. Similarly, Section 409 does not bar consideration of documents generated in the process of implementing and installing crossing projects under 23 C.F.R. Part 924. With regard to grade-crossings, Section 409 covers only documents compiled for the purpose of

identifying, evaluating, and planning safety enhancement of those crossings. Implementation and installation documents are conspicuous by their absence from Section 409.[10]

This plain-language result is consistent with the structure of the FRSA and the purpose of Section 409. Section 409 was enacted in 1987, Pub. L. No. 100-17, § 132(a), 101 Stat. 152, 170, a decade-and-a-half *after* the enactment of the FRSA's preemption provision, 45 U.S.C. § 434 (now codified at 49 U.S.C. § 20106). This chronology itself strongly suggests no link between the two, and nothing in the text of Section 409 or its legislative history mentions preemption under the FRSA, let alone supports the reading that Petitioner ascribes to Section 409.

Indeed, the logic of Section 409 is to the contrary. Section 409 is an evidentiary and discovery privilege, whose purpose is to promote the flow of information from the States to the FHWA and, as Petitioner maintains, to "facilitate candor"

[10] This conclusion is underscored by considering the type of information that *is* protected by Section 409. For instance, Section 409 bars the use of documents or data compiled pursuant to 23 U.S.C. § 130, which requires States to issue, among other things, annual reports that compile data regarding grade crossings. Although such reports are non-discoverable and inadmissible under Section 409, they do not include the FHWA approvals contemplated by Section 646.214(b). More fundamentally, Section 409 does not include such approvals in the documents and data subject to its privilege. *See* Cert. App. 21a. In sum, Section 409 simply does not bar a court from considering evidence relevant under Section 646.214(b). *See also* JA 102 (testimony of engineer in charge of Tennessee crossing program confirming that there is no obstacle to State providing information on "what was done at a particular crossing" after improvements are made). As the Sixth Circuit showed, the reports and surveys issued pursuant to the two other provisions referred to in Section 409 – 23 U.S.C. §§ 144 and 152 – similarly do not contain the FHWA approvals contemplated by 23 C.F.R. § 646.214(b). Cert. App. 21a.

in agency evaluations of highway safety hazards. Pet. Br. 44. It thus assumes the continued *existence* – not the preemption – of tort actions involving a wide range of railroad-related accidents, including specifically those involving "railway-highway crossings." 23 U.S.C. § 409. Put differently, Section 409 only places certain information off-limits in civil litigation, which *presupposes* that common-law actions pertaining to grade-crossing accidents will go forward.[11]

[11] Petitioner fails to remind the Court that Section 409 was raised by the railroad in *Easterwood* for the same proposition as Petitioner urges here: the alleged impossibility of meeting its preemption "burden." In response to the Solicitor General's contention that preemption required the railroad to demonstrate that federal funds were used specifically to upgrade the crossing devices at the Cook Street Crossing, the railroad argued that such proof could not be discovered or judicially considered under Section 409. Reply Brief for Petitioner/Cross-Respondent in *CSX* v. *Easterwood*, at Part III.C.1, Nos. 91-790, 91-1206 (U.S. filed Nov. 16, 1992). In rejecting the railroad's preemption argument, and holding that federal funding was a necessary (although not a sufficient) condition for preemption, this Court in *Easterwood* did not so much as mention the railroad's Section 409 argument. The Court presumably recognized, as did the Sixth Circuit below, that Section 409's privilege does not cover simple proof of FHWA funding or approval and does not, therefore, have any bearing on preemption. Indeed, Petitioner now concedes that "it is possible to identify Oakwood Church Road as one of the crossings at which warning devices were installed in this project," Pet. for Cert. 9 n.11, tacitly acknowledging that the kind of information that the railroad claimed in *Easterwood* could not be discovered and judicially considered was in fact both discovered and considered.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court held that the Federal Highway Administration's ("FHWA") warning-device regulations at 23 C.F.R. § 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained," 507 U.S. at 670, and by limiting the financial responsibility of railroads for federally funded crossing improvements, *id.* at 671. Under the Federal Railroad Safety Act, 49 U.S.C. § 20106, this Court held, those regulations "cover[] the subject matter of" state tort law imposing a duty of care on railroads in the selection of warning devices. *Easterwood*, 507 U.S. at 670. Accordingly, "*when they are applicable*, state tort law is pre-empted." *Id.* (emphasis added). By their plain terms, those regulations are applicable, *inter alia*, to "*any* project where Federal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i) (emphasis added). Thus, this Court held that state tort law "impos[ing] an independent duty on a railroad to identify and/or repair dangerous crossings" is pre-empted "for projects in which federal funds participate in the installation of warning devices." 507 U.S. at 671.

Despite the authority of *Easterwood*, respondent and the United States as *amicus curiae* now argue that the regulation does not mean what it plainly says. They contend that subsections (b)(3) and (b)(4) are inapplicable to projects in which federal funds participate in the installation of the predominant (and perfectly acceptable) form of warning devices at the nation's public grade crossings: namely, passive devices such as signs and pavement markings. See Resp. Br. 38-39. This interpretation is irreconcilable with the plain meaning of the regulation.

It defies the statutory scheme. It has not been adopted by any court. It is contrary to the positions taken by the United States in *Easterwood*, see Pet. Br. 28-29, and in a 1995 notice of proposed rulemaking stating that under *Easterwood* preemption "depend[s] upon whether or not improvements to a particular grade crossing were federally funded."[1] The new theory also conflicts with the one taken by respondent both in the court of appeals and in her opposition to certiorari.[2] Most fundamentally, it is contrary to the understanding of the States who are subject to the approval regime of 23 C.F.R. § 646.214(b). The *amici* States supporting petitioner affirmatively state that all federal funding projects, including those for signs, are administered under (b)(3) and (b)(4).[3] Even the States supporting affirmance do not embrace this novel theory. See Br. of North Carolina *et al.* as *Amici Curiae* at 13-19 (arguing that *Easterwood* was wrongly decided). In short, the new theory of respondent and the Solicitor

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[1] Selection and Installation of Grade Crossing Warning Systems, 60 Fed. Reg. 11,649, 11,651 (Mar. 2, 1995) (*"Warning Systems"*). *See also* Br. for the United States as *Amicus Curiae* at 24, *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993) (Nos. 91-790, 91-1206) (*"for federally funded projects . . .*, [t]he regulation requires gate arms in certain circumstances, and requires FHWA approval of the safety devices *in all other circumstances*") (second emphasis added). It is also inconsistent with a later *amicus* brief, which argued that (b)(4) applied to passive-device projects but preemption required express FHWA approval of the devices. *See Amicus Curiae* Br. of the United States at 18-22, *Pearson* v. *Columbus & Greenville Ry. Co.*, 672 So.2d 773 (Miss. Ct. App. 1995) (No. 93-CA-01265-COA) (Supplemental Lodging for Petitioner, Tab A).

[2] Br. of Appellee at 28 (No. 96-6371) (C.A. Docket Apr. 24, 1997) (not contesting the applicability of the regulations but arguing that the predicate for preemption was lacking if she could prove at trial the existence of (b)(3) conditions); Opp. 6-8 (same).

[3] Br. of Texas as *Amicus Curiae* at 7. *See also* Lodging for the Association of American Railroads (letters from nine other States or state agencies that the rule below interferes with the (b)(3) and (b)(4) scheme).

General is neither a fair reading of the regulation nor an accurate account of historical administrative practice, but simply a *post-hoc* contrivance invented for this case that should be rejected.

ARGUMENT

I. THE FHWA DOES NOT ADMINISTER A DISTINCT "MINIMUM PROTECTION PROGRAM" NOT COVERED BY 23 C.F.R. § 646.214(b)(3)-(4).

Conveniently using nomenclature specific to the Tennessee Department of Transportation ("TDOT"), respondent and the Solicitor General strive to convince this Court that the FHWA administers two separate programs—what they style "the minimum protection program" and "the hazard" or "priority" program—that purportedly are implemented by two separate regulations. See, *e.g.*, U.S. Br. 7, 10; Resp. Br. 1, 4-6, 22-23, 25, 28. They contend that the hazard program involves crossing surveys, data analysis, diagnostic teams and development of priority improvement projects. See, *e.g.*, Resp. Br. 5. They argue that, by contrast, the distinct "minimum protection program" involves no data collection and analysis, *id.* at 6, 35, but simply "the release" of federal funds to meet the signs requirement of 23 U.S.C. § 130(d). *Id.* at 23.

That claim is patently false, and belied by the statute and regulations. Section 130(d) provides in full:

> Each State shall conduct and systematically maintain a survey of *all highways* to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a *schedule of projects* for this purpose. *At a minimum, such a schedule* shall provide signs for all railway-highway crossings.

23 U.S.C. § 130(d) (emphases added). Congress created a unitary section 130 crossing program under which States would systematically gather data on every single crossing, evaluate the conditions at every crossing to iden-

tify hazardous ones in need of safety improvements, and then establish a schedule of projects. The phrase "at a minimum" is not referring to the level of protection at certain crossings, but rather establishes that provision of signs "for *all* railway-highway crossings" is a minimum requirement of the schedule. *Accord* 23 C.F.R. § 924.9 (a)(3)-(4) & (b).

Congress thus did not create an ongoing "minimum protection" program for unanalyzed crossings that would be left without adequate protection. Instead, it intended that the States, through individualized, data-driven analysis of crossing hazards, would identify the "large number of crossings carrying low volumes of both vehicular and train traffic" that lacked "sufficient accident potential to justify train actuated protection." H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1893. Congress appropriated funds "to provid[e] *adequate* signing at all such crossings," and envisioned that by 1976 "every railroad crossing w[ould] be equipped with *adequate* warning signs located at a proper distance from a crossing, and new high visibility signs at the rail-highway crossing proper." *Id.* (emphases added); see also U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem*, ii (1972) ("*1972 Crossings Report (Part II)*") (requiring passive devices "to *effectively* treat the large number of *lower volume crossings that do not warrant active protection* and to provide effective advance warning at all crossings") (emphasis added). Because they are part of a unitary program, passive-device projects are paid for with the same federal funds under the same procedures as other crossing-improvement projects, see 23 C.F.R. § 924.11(b); Pet. Br. 16-17, and they are likewise submitted to the FHWA to "be *approved* by the Division Engineer." 6 U.S. Dep't of Transp., Transmittal 39, *Federal-Aid Highway Program Manual* § 8-2-1, ¶ 6.c(1) (1974) (Respondent's Lodging). See also 23 C.F.R. § 630.205(e); Pet. Br. 16-17.

II. THE WARNING-DEVICE REGULATION APPLIES TO ALL FEDERALLY FUNDED DEVICES.

Respondent and the Solicitor General suggest this false dichotomy in section 130(d) to bolster a claim that separate regulations implement the "minimum protection program" and the "hazard program." They maintain that 23 C.F.R. § 646.214(b)(1) is the "minimal-protection regulation" that exclusively "implement[s] the minimum protection requirement in 23 U.S.C. 130(d)," U.S. Br. 10; Resp. Br. 37, whereas, the preemptive regulations of (b)(3) and (b)(4) pertain only to diagnostic-team evaluations of crossings in the "long-term prioritization program," U.S. Br. 10. This position cannot be reconciled with the regulatory text.

First, characterization of (b)(1) as the "minimal-protection regulation" is disingenuous. This regulation by its terms mandates that "[a]ll traffic control devices shall comply with the . . . Manual on Uniform Traffic Control Devices for Streets and Highways [("*MUTCD*")], 23 C.F.R. § 646.214(b), and is designed to ensure uniform standards for active devices like gates and flashers as well as passive devices. See *MUTCD* at 8C-1 to 8C-9 (1988) (standards for gates and flashers). The crossbucks requirement is one of a host of *MUTCD* rules made mandatory by (b)(1) for both active and passive devices, and nothing in (b)(1) excludes passive devices from the adequacy rules of (b)(3) and (b)(4).[4]

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[4] Furthermore, signs-and-markings projects cannot be said to be necessary to implement a statutory mandate of "signs" at all crossings. Markings are regarded as distinct traffic control devices from signs under both the *MUTCD* and federal regulations. *MUTCD* at 2A-1, 3A-1 (devoting Part II to "Signs" and Part III to "Markings"); 23 C.F.R. § 646.204 (passive warning devices).

As to (b)(3) and (4), even though the issue is the applicability of these preemptive regulations, respondent and the Solicitor General steadfastly ignore the operative language defining when (b)(3) and (b)(4) apply: namely, to "*any* project where Federal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i) (emphasis added). The words "project" and "devices" are defined terms in the regulations that clearly encompass projects for the installation of passive warning devices. See 23 C.F.R. § 646.200(b) (term "*projects*[] applies to Federal-aid projects involving railroad facilities, including projects for the elimination of hazards of railroad-highway crossings"); *id.* § 646.206(a)(3) ("Projects for the elimination of hazards . . . of railroad-highway crossings may include but are not limited to . . . [g]rade crossing improvements")[5]; *id.* § 646.204 (defining "signs, markings, and other devices" as "[p]assive warning devices"). This Court does not deviate from defined terms in a regulation or statute. Moreover, not only does the regulation use the broadly defined term "project," but it explicitly provides that the rules it sets forth apply to "any project." *Id.* § 646.214(b)(3)(i). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). The Solicitor General nowhere explains how some *projects* do not fall within the regulation's all-inclusive language.

The Solicitor General contests the plain-language reading of "any project" because allegedly "[t]he applicability of (b)(3) . . . cannot be determined without a diagnostic team reviewing the particular crossing." U.S. Br. 18. This is absurd on its face. Diagnostic teams conduct

[5] The term "crossing improvement" encompasses the "installation of standard signs and pavement markings." U.S. Dep't of Transp., *Railroad-Highway Crossing Handbook* 183 (2d ed. 1986) ("*Crossing Handbook*").

detailed, on-site engineering studies of crossings that "have been selected from the priority schedule." *Crossing Handbook* at 79; 23 C.F.R. § 924.9(a)(3) (engineering studies are to be conducted at identified "hazardous locations"). A diagnostic team—which "usually includes a highway traffic engineer, a railroad signal engineer, and, as appropriate, representatives of highway design and maintenance agencies and federal, state, and local officials," U.S. Br. 7 n.15—is not necessary to determine the simple factual point of whether there are "[m]ultiple main line railroad tracks" at a crossing. 23 C.F.R. § 646.214(b)(3)(i)(A). Nor is such a team necessary, for example, to determine whether there are multiple (non-mainline) train tracks where the trains may pass simultaneously, *id.* § 646.214(b)(3)(i)(B), "[h]igh [s]peed train[s] . . . combined with limited sight distance," *id.* § 646.214(b)(3)(i)(C), "[a] combination of high speeds and moderately high volumes of highway and railroad traffic," *id.* § 646.214(b)(3)(i)(D), or "a high number of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, [or] continuing accident occurrences," *id.* § 646.214(b)(3)(i)(E).

These are *factual* triggers for the federal mandate of gates and flashers in federally funded installations. The State already will have identified (b)(3) factors in its crossing survey and compilation of accident data, and used some or all of these factors in assessing the accident risk of every crossing to develop a schedule of priority projects *before* a diagnostic team is even formed. See *Crossing Handbook* at 51-78.[6] *Amicus curiae* Texas has verified that it often programs section 130 installation projects based on hazard analysis and does not even form

[6] There is variation among the States as to what hazard factors are incorporated into the computerized analysis, and which are assessed separately. *See Crossing Handbook* at 78-79.

diagnostic teams until federal funds have been obligated for the project.[7]

There is no way to confine (b)(4) to those limited circumstances where diagnostic teams have ruled out (b)(3) conditions; it applies broadly to all "crossings where the requirements of . . . (b)(3) are not applicable." 23 C.F.R. § 646.214(b)(4). Respondent tries to rescue the mandatory-diagnostic-team theory by arguing that (b)(4) "is triggered only when a diagnostic team's recommendation 'justifies' to FHWA that lights and gates are not required" under (b)(3)(ii), Resp. Br. 38-39, because in that circumstance "FHWA may find that the [(b)(3)(i)] requirements are not applicable," 23 C.F.R. § 646.214(b)(3)(ii). That is nonsensical because (b)(3)(ii) is nothing more than a provision allowing FHWA to *waive* gates and flashers when the factual (b)(3)(i) conditions (such as multiple line tracks) exist. Only then does a diagnostic team need to "justif[y] that gates are not appropriate." *Id.* § 646.214(b)(3)(ii).

Moreover, the new theory creates an indefensible regulatory gap. If a State proposes a large project to install passive protective devices beyond the *MUTCD* minimum (such as rumble strips or continuously flashing lights, or, as in Tennessee, supplemental pavement markings, U.S. Br. 21 n.28), at crossings not evaluated by diagnostic teams, there would be no regulatory mechanism for FHWA to approve "the type of warning device" that would be paid for with federal funds, 23 C.F.R. § 646.214(b)(4). The notion that FHWA would be an impotent participant in the process and not retain approval authority

[7] At hazardous crossings, the diagnostic team verifies all facts bearing on device selection, including the existence of (b)(3) conditions. *See Crossing Handbook* at 55. The diagnostic team also may recommend flashers and gates even in the absence of such conditions (in which case the State must install them), 23 C.F.R. § 646.214(b)(3)(i)(F), or recommend that FHWA waive the flashers-and-gates requirement, *id.* § 646.214(b)(3)(ii).

to ensure the effective use of federal funds defies common sense. *Easterwood*'s straightforward reading of the regulation is the right one. The regulation divides the world into (b)(3) and (b)(4) crossings; for the former, gates and flashers are mandatory unless the FHWA waives the requirement, and device selections at all other crossings are "subject to the approval of FHWA," *id.* § 646.214(b)(4). See *Easterwood*, 507 U.S. at 669.

The new theory of respondent and the Solicitor General also fails because it is irreconcilable with the application of (b)(3) and (b)(4) to review of *all* grade crossings encompassed by federal-aid highway projects, a review mandated by subsection (b)(2) and 23 U.S.C. § 109(e). Tellingly, they do not even address this critical regulatory requirement, which forbids FHWA to accept any such project "until adequate warning devices for the crossing are installed and functioning properly." 23 C.F.R. § 646.214(b)(2).

The same "adequacy" requirements apply to (b)(2) crossings as to crossings where federal funds pay for devices. *Id.* § 646.214(b)(3)(i). If the Solicitor General were right that "[t]he applicability of (b)(3) . . . cannot be determined without a diagnostic team reviewing the particular crossing," U.S. Br. 18, then no federal-aid highway project could ever be accepted unless a diagnostic team studied every single crossing within or near the project. Crossings with only passive protection have always been prevalent on the federal-aid highway system. See *1972 Crossings Report (Part II)* at 7 (55% of such crossings have only passive protection). Myriad federal highway improvement projects—involving highway repavings or markings, installations or upgradings of guardrails or medians, widenings of highway shoulders, illumination, and the like—encompass crossings with passive as well as active devices. It would be a sheer impossibility and waste for a State to dispatch diagnostic teams to do engineering

studies of all such crossings, even when there is no question of a (b)(3) hazard. *Amicus curiae* Texas has again informed us that it does not conduct (or submit to FHWA) diagnostic studies of every crossing in every federal-aid highway project before FHWA accepts it.[8] Thus the adequacy requirements of (b)(3) and (b)(4) apply to *all* crossings within or near the limits of a federal-aid highway project or where federal funds participate in the installation of devices, not just priority hazardous crossings that warrant convening a diagnostic team.

The fact that a crossing was not selected for a diagnostic-team study as part of a given year's prioritization program, and was instead included in a general program to install passive devices, does not mean that the State has not given individualized consideration to a crossing, as respondent and the Solicitor General repeatedly state. First, it is often the case that a diagnostic team has studied a crossing in *prior* years and determined that active devices are unnecessary. The State will not reconsider that crossing absent new information suggesting danger. Oakwood Church Road Crossing is a perfect illustration. TDOT conducted a diagnostic team study of this crossing on June 9, 1983 (when the tracks were owned by another railroad), and found that:

> [t]his crossing does not have sufficient train/vehicle exposure to qualify for active devices . . ., nor is there a sight-distance problem at the crossing. The crossing will be upgraded with passive "Railroad Advance Warning" signs, pavement markings, etc. in

[8] No deference is due the Secretary's novel theory where the Court has already interpreted a provision of law, as it has done here. *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990). Regardless, the preconditions for deference—ambiguity in the regulation, consistency with the statute, and reasonableness of the interpretation—are not met. *See also Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (no deference to interpretations "wholly unsupported by regulations, rulings, or administrative practice").

> the Department's ongoing program for minimum grade crossing protection which is underway statewide.

Letter from Robert E. Farris, TDOT, to Rep. Ed Jones (June 17, 1983) (Cantrell Dep. Exh. 6) (Oct. 12, 1995) (W.D. Tenn. Docket Enry No. 52) (filed Feb. 16, 1996) (Supplemental Lodging for Petitioner, Tab C).[9] It distorts the ongoing nature of the section 130 program to look only at actions taken in the year of a funding decision.

Second, *all* crossings upgraded with federally funded passive protections, whether or not reviewed by a diag-

[9] Respondent found an "expert" to testify to the contrary, but his testimony demonstrates the arbitrariness of tort suits alleging the inadequacy of federally funded warning devices, given the preclusion of use of all official safety data by 23 U.S.C. § 409. According to the "expert," Oakwood Church Road Crossing was one of the more dangerous crossings in the country, beset by numerous hazardous (b)(3) conditions, any one of which would mandate gates and flashers under federal law. *See* Resp. Br. 36. Only one of his findings was directly refutable in court: namely, his erroneous contention that 40 mph was the standard for "high speed trains," Tr. 149. *Cf.* 49 C.F.R. § 213.301 (80 mph standard); U.S. Dep't of Commerce, Policy and Procedures Memorandum 21-10, ¶ 20(c)(4) (1958) (*"PPM"*) (Lodging for Petitioner) (former standard of 70 mph). But the witness also testified that the mere use of propane tanks by rural residents implied use of the crossing by "substantial numbers of . . . trucks carrying hazardous materials," 23 C.F.R. § 646.214(b)(3)(i)(E); Tr. 147. That dubious claim not only usurped the State's prerogative to define that standard, Pet. Br. 39 n.20, but it also could not by law be rebutted by the State's actual assessment. Moreover, the witness made wildly exaggerated estimates of train movements and vehicular traffic based on personal observation, Tr. 145-47, that were directly refutable by inadmissible official crossing inventory data. (If this Court believes that section 409 permits it to consider the crossing inventory report to resolve the strictly legal issues presented, the report is in petitioner's Supplemental Lodging, Tab E.)

nostic team, receive individualized consideration.[10] State officials must periodically visit the crossing to gather inventory information and fulfill the State's systematic survey obligations under section 130(d); the State must analyze, in processes approved by the FHWA, the accident potential of each crossing based on its specific conditions in compiling its hazard index, Pet. Br. 33-35, and, as happened *in this project*, when the State works up an estimate for federal funds to upgrade passive protections, an expert highway official must visit the site to determine what devices are required to comply with federal and state regulatory standards. See, *e.g.*, J.A. 134; Cantrell Dep. at 9 (May 3, 1995) (W.D. Tenn. Docket Entry No. 52) (filed Feb. 16, 1996) (Supplemental Lodging for Petitioner, Tab B). After the Tennessee team performed this review, "the projects were program[m]ed and sent to [FHWA] for their approval," Cantrell Dep. at 9, clearly under (b)(4). The State does not make device selections willy nilly in ignorance of crossing conditions;[11] when it installs passive devices at a crossing, it has determined that the risks of having those devices at a particular crossing are acceptable under the circumstances.[12] See

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[10] In any event, FHWA has always deemed adequate state device recommendations "of a general or Statewide nature and not for a specific project." *See PPM* 21-10, ¶ 20(5).

[11] Respondent mischaracterizes the testimony of the Tennessee highway engineer as saying that there was no individualized consideration of crossings in this project. Resp. Br. 31-37. He testified to the obvious fact that there was no crossing-specific engineering analysis during the sign project itself. *Id.* at 32, 35. But he also testified that every crossing in Tennessee was analyzed for accident potential before improvement decisions were made, J.A. 100, and that each of the improved crossings was visited by a design team.

[12] If a State identifies a crossing as hazardous but lacks immediate funds to install active devices, it does not ordinarily leave the public at risk, as respondent suggests. Interim measures are taken, such as "install[ing] a STOP sign . . . until active [devices] can be installed." *MUTCD* at 8B-9.

Letter from Greg Schertz, FHWA, to R.E. Stotzer, Jr. 1-2 (Jan. 17, 1989) (Supplemental Lodging for Petitioner, Tab D).

In summary, this Court should reject the attempt of respondent and the Solicitor General to redefine the legal standard of "adequacy" of federally funded devices as optimization of crossing protection through diagnostic-team evaluation. See, *e.g.*, Resp. Br. 37. "Adequate warning devices" is a defined term under the regulations: warning devices meet federal adequacy standards so long as (b)(3) conditions requiring automatic gates and flashers are absent, and the devices are "subject to the approval of FHWA." FRSA preemption does not require a congruence of federal and state law; the federal regulation must simply "cover[] the subject matter." 49 U.S.C. § 20106. For all federally funded installations, subsections (b)(3) and (b)(4) cover the subject matter because they "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Easterwood*, 507 U.S. at 670.[13] The devices at Oakwood Church

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[13] Respondent floats the argument (not joined by the Solicitor General) that there is no preemption because pavement markings allegedly required by the *MUTCD* were not present. Resp. Br. 20-22. But preemption depends on the applicability of a regulation covering the subject matter of state law, not on an FHWA or state official's compliance with that regulation. *See Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 308 (7th Cir. 1994) ("the preemptive effect of a safety requirement laid down by the Secretary cannot be challenged in a tort suit by arguing to the court that he made a mistake"). In any event, respondent misapplies the *MUTCD*, which at the time only required pavement markings when "the prevailing speed of highway traffic is 40 mph or greater." *MUTCD* at 8B-5. Oakwood Church Road intersects U.S. Highway 45 less than 90 feet from the crosssing, and there is a stop sign at the intersection of the highways. Pl. Mem. Sum. Judg., Burnham Affidavit, Exh. D (W.D. Tenn. Docket Entry No. 40) (filed Feb. 16, 1996). Because cars from one direction have only 90 feet in which to accelerate, and cars from the other direction must slow down as they approach the intersection, it is unlikely that the prevailing speed at the cross-

Road were installed with federal funds and subject to FHWA approval. Thus, respondent's inadequate-device claims are preempted.[14]

Even if the regulation were not so clear as it is, the statute it implements forbids the interpretation advanced by the respondent and the Solicitor General. Congress placed upon the Secretary of Transportation longstanding duties to (1) approve only those federal-aid projects providing facilities that will "adequately serve" traffic needs "in a manner that is conducive to safety," 23 U.S.C. § 109(a); (2) permit only those "warning signs . . . as will promote the safe and efficient utilization of the highways," *id.* § 109(d); and (3) approve "[n]o funds . . . for expenditure on any Federal-aid highway . . . unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation . . . on that portion of the highway with respect to which such expenditures are to be made," *id.* § 109(e).

Respondent and the Solicitor General attempt to escape section 109 by arguing that in 1987 Oakwood Church Road was not a "federal-aid highway" under the former definition of that term, 23 U.S.C. § 101(a) (1988); U.S. Br. 24. and thus section 109 does not apply. This is wrong. It is undisputed that, on the heels of section 130(d). Congress. in 1975 (before the promulgation of the regulation) and again in 1976, expressly made the requirements of chapter 1 of Title 23—including section 109—applicable to all off-system roads. Pub. L. No. 94-280, § 203(c), 90 Stat. 451, 452 (1976) (Rail-Highway Crossings Off-System Program); Pub. L. No. 93-643, § 122(a),

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ing was anything near 40 mph, which may be why Mr. Shanklin was driving at 20 mph at the time of the accident, Pet. App. 2a.

[14] The Solicitor General is correct that federal funding is generally not preemptive, U.S. Br. 22, but it is preemptive here because it triggers the imposition of federal-law decisional requirements. *Easterwood*, 507 U.S. at 671.

88 Stat. 2281, 2289 (1975) (formerly codified at 23 U.S.C. § 219; repealed 1987); cf. U.S. Dep't of Transp., Memorandum, *Producing a Schedule in Each State for Signing and Marking All Public Railroad-Highway Grade Crossings* 2 (Oct. 8, 1976) ("*1976 Memorandum*") (section 219 funds used for signs) (Respondent's Lodging).

The Solicitor General contends that Congress abolished the requirement of compliance with section 109 when it merged the Off-System and On-System programs in 1978. This interpretation simply makes no sense. First, concerned that "about one-half of the 170,000 grade crossings off the Federal aid-system ha[d] inadequate warning devices" and wanting to "bring warning devices at off-system crossings up to acceptable levels," H.R. Rep. No. 95-1485, at 44 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6575, 6620, Congress simply eliminated funding categories to give the States more flexibility to address inadequate off-system crossings. See Comptroller General, CED-78-83, *Rail Crossing Safety—At What Price?* 29 (Apr. 25, 1978). The Solicitor General's interpretation bizarrely implies that Congress meant to eliminate adequacy requirements even for the most hazardous off-system crossings. Second, the express requirement of section 109 compliance was retained for improvements funded under section 219, see 23 U.S.C. § 219(e) (1982), and Congress could not have intended the applicability of section 109 to turn on the source of the appropriations. It is clear that unified standards applied to all crossings in the merged program, and thus section 109 applied to Oakwood Church Road in 1987.

Regardless, respondent and the Solicitor General cannot escape section 109's mandate by arguing about the status of this particular highway, for they are advancing an interpretation of the regulation that applies to *all* highways. If their interpretation of 23 C.F.R. § 646.214 (b)(3) and (4) conflicts with the statute, it cannot be adopted. The FHWA has always funded large-scale sign-

installation projects on federal-aid highways. *1976 Memorandum* at 2. Because the so-called "minimum protection program" is conducted on federal-aid highways, they must explain how the FHWA can permit the installation of assertedly "inadequate" passive devices and still comply with section 109(e). Furthermore, FHWA's principal push on signs occurred from 1975 to 1978, when section 109(e) unquestionably applied to all crossings. See *id.*

There is no way to reconcile the new interpretation of (b)(3) and (b)(4) with section 109(e). As respondent acknowledges, section 109(e) imposes "a *per se* rule" that warning devices on covered highways comply with federal adequacy standards. Resp. Br. 40. Section 130(d)'s requirement of signs at all crossings cannot be read as an implied limitation on 109(e). Section 130(d) is a condition of receiving *any* federal crossing funds, *Easterwood*, 507 U.S. at 663; U.S. Br. 15, and States must comply with its requirements regardless of whether they receive federal funds to install the signs. Section 109(e), on the other hand, is a *project-specific* limitation on the expenditure of federal funds. Thus, when (b)(3) conditions apply, gates and flashers are the "absolute minimum requirements" for receiving federal funds. U.S. Dep't. of Transp., HNG-14, at 1 (March 20, 1973) (Lodging for Petitioner). The Solicitor General equivocates that section 109(e) "dictates a contextual and time-sensitive inquiry" into adequacy, U.S. Br. 25, but the Department's longstanding interpretation has always been that "definite provision shall be made in the conditions of the proposed project for the installation of proper safety devices, either with or without Federal-aid participation." *PPM* 21-10, ¶ 20 a. Nor does this straightforward reading of section 109(e) prevent FHWA from funding projects for signs "because such programs by definition install minimum rather than adequate protection." U.S. Br. 25. The Solicitor General simply ignores once again the regulatory definition of "adequacy": that is, adequacy consists of gates and flashers if (b)(3) conditions exist, and, if not, the device is subject to FHWA approval. Thus, federal funding of passive-protection projects is normally available without affront to federal adequacy standards; it is only not permitted in the narrow circumstance of a (b)(3) crossing where there are no gates and flashers and no "definite provision" in the project for installing them.

III. THERE ARE NO POLICY REASONS TO NARROW *EASTERWOOD*.

Their statutory and regulatory analysis unavailing, respondent and the Solicitor General invoke the presumption against preemption. That issue is already settled by *Easterwood*. The presumption is only relevant to interpreting the express preemption provision of the FRSA, and, applying that presumption, this Court nonetheless found that subsections 646.214(b)(3) and (4) cover the subject matter of a railroad's state law duty of care in selecting warning devices. This Court also directly rejected the argument that "the preemptive scope of federal regulations likewise turns upon the intent of the promulgating authority." U.S. Br. 14. It held to the contrary that FRSA does not "call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter of [state law]." *Easterwood*, 507 U.S. at 675.

Adherence to *Easterwood* also does not grant "a blanket immunization for the railroads from tort liability" for crossing accidents, see U.S. Br. 26. *Easterwood* left most of the railroad's common-law duty to provide fair warning intact (such as the duty to blow horns, ring bells, and display lights on approach), and was careful to limit its preemption holding to "tort law [that] seeks to impose an *independent* duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671 (emphasis

added).[15] In the modern era where motor vehicle traffic is the principal creator of risk at railway crossings, see Pet. Br. 4, safety depends on traffic control, and railroads have no independent authority whatever to stop traffic with gates, or to post signs or mark pavement on a public right-of-way. Furthermore, for federally funded projects, the railroads do not conduct independent evaluation and selection of devices; that function belongs to the States. Thus, for all projects where federal funds participate in the installation of devices, the FHWA regulations at "§§ 646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings," and limit "railroad involvement in the selection of warning devices" to "participation in diagnostic teams," if the State invites them. *Easterwood*, 507 U.S. at 670-71. Where railroads no longer act because of the federal scheme, they no longer have a legal duty.

Contrary to the claims of respondent, adhering to the rule of *Easterwood* in this case does not deprive plaintiffs of a remedy for any wrong done to them by the railroad. Railroads remain liable for breach of all retained state and federal duties at railroad crossings, including breach of any duties assigned to railroads under the section 130 program. See Pet. Br. 47 n.25. The "wrong" the railroad allegedly committed was the failure to offer to pay the government for crossing improvements the government had chosen not to fund. See J.A. 107-08; Resp. Br. 23-24. Not only is this irrational, but having state tort law impose duties on railroads to subsidize supplemental improvements would directly conflict with the federal-law prohibition of a railroad's paying any portion of improvement costs at federally funded crossings. *Easterwood*, 507 U.S. at 671.

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[15] *Easterwood* also therefore does not preempt other state laws unrelated to the railroad's common law duties regarding device selection. *Cf.* Resp. Br. 28-29.

Finally, the suggestion that proper interpretation of *Easterwood* would have "terrible implications for safety," Resp. Br. 27, is fallacious. The Department of Transportation has recognized that because "[a] railroad has only data available to it which is railroad specific," it "do[es] not have the requisite analytical . . . ability to make the appropriate decisions regarding the most appropriate focusing of limited safety improvement funds." *Warning Systems*, 60 Fed. Reg. at 11,649-50.[16] State tort law distorts rather than augments the section 130 program:

> While this system may have been appropriate in the past, when there was no systematic and uniform improvement program in existence, today the result is one of misallocation of scarce resources.

Id. at 11,651.

Aside from the undesirability of any railroad duplication of the section 130 program, it is simply a practical impossibility. Norfolk Southern has more than 20,000 public grade crossings on its system; the Union Pacific has 31,000. U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 1998* Tables 9-1, 9-2 (1999). Moreover, it would also be economically irrational for a railroad to fund improvements, which can exceed $100,000 at a crossing, 60 Fed. Reg. at 11,650, given that (as the Secretary recognizes) such improvements *yield no net*

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[16] *Warning Systems* was a rulemaking to go beyond *Easterwood* and preempt railroad tort duties even where devices are not federally funded. 60 Fed. Reg. at 11,651. Under pressure from the trial lawyers, the Department terminated the rulemaking, declaring that it lacked the hard data to ensure that railroad safety would be "best served by issuance of such a regulation *at this time*." Selection and Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42,733, 42,733, 42,734 (Aug. 8, 1997) (emphasis added). The Department emphasized, however, that it "continues to believe that the proper relationship between railroads and state and local governments in terms of selection and installation of warning systems is as proposed in the NPRM." *Id.* at 42,734.

benefit to the railroad. Pet. Br. 12; 60 Fed. Reg. at 11,651 (a railroad responsibly expending safety funds may still "be subjected to large tort judgments resulting from the relatively random occurrence of accidents at grade crossings of low hazard relative to those improved"). In sum, respondent is not crusading for safety, but for a socially deadweight transfer of money to plaintiffs, and to the trial lawyers and plaintiffs' witnesses who thrive on grade crossing litigation.

CONCLUSION

This Court should adhere to *Easterwood* and reverse the judgment below.

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NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether state-law tort claims of negligence, based on inadequate warning devices at a railway-highway grade crossing, are preempted because federal funds participated in the installation of the warning devices as part of a congressionally mandated program to ensure a minimum level of protection at all such crossings.

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In the Supreme Court of the United States

No. 99-312

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The question in this case is whether state-law tort claims arising out of accidents at railway-highway grade crossings are preempted by federal law governing safety at such crossings. The Federal Railroad Safety Act of 1970, 49 U.S.C. 20101 *et seq.*, and the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, vest broad powers in the Secretary of Transportation over railroad and highway safety. The Federal Railroad Safety Act also contains an express preemption provision (49 U.S.C. 20106) that is triggered solely through regulatory action by the Secretary. The United States has a strong interest in how these statutes and their implementing regulations are interpreted and applied.

STATEMENT

1 .a. "Nearly 10 times each day a train and a motor vehicle or a person collide at a rail-highway grade crossing"; in 1998,

431 people died in such accidents.[1] The States historically have borne primary responsibility for protecting public safety at railway-highway crossings. They generally have required the railroads, both through statute and common law tort duties, to provide adequate warnings to the public at crossings and to exercise due care in their design, construction, and maintenance. See, *e.g.*, *Grand Trunk Ry.* v. *Ives*, 144 U.S. 408, 416-420 (1892).

With annual death tolls from crossing accidents rising as high as 2500 in the first half of the twentieth century, Congress passed numerous laws that provided federal financial assistance to the States to improve safety at crossings.[2] In 1970, concerned about the "large and steady increase in the number of train accidents" and the "extremely high fatality rate" of such accidents,[3] Congress enacted the Federal Railroad Safety Act (Railroad Act), 49 U.S.C. 20101 *et seq.*, "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents," 49 U.S.C. 20101.[4] The Railroad Act vests the Secretary of Transportation with the broad authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. 20103(a).[5] It also directs the Secretary to "maintain a

[1] Dep't of Transp. (DOT), Off. of Insp. Gen., *Audit Report: Rail-Highway Grade Crossing Safety* at i (Sept. 30, 1999) (*Audit Report*).

[2] See Federal Highway Admin. (FHWA), *Rail-Highway Crossings Study* 1-8 to 1-9 (Apr. 1989) (*1989 Study*); FHWA, *Railroad-Highway Grade Crossing Handbook* 8-11 (Sept. 1986) (*Crossing Handbook*).

[3] H.R. Rep. No. 1194, 91st Cong., 2d Sess. 72 (1970); see also S. Rep. No. 619, 91st Cong., 1st Sess. 1 (1969).

[4] The Railroad Act originally was codified at 45 U.S.C. 421 *et seq.* In 1994, Congress recodified the Act's provisions in Title 49, without altering their substance. See Pub. L. No. 103-272, § 6(a), 108 Stat. 1378. This brief will cite to the Railroad Act as currently codified.

[5] The Secretary has delegated the authority to promulgate rail safety regulations to the Federal Railroad Administration, 49 C.F.R. 1.49(m), and the authority to promulgate regulations pertaining to highway safety to the Federal Highway Administration (FHWA), 49 C.F.R. 1.48(o), 1.49(m). See also *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993).

coordinated effort to develop and carry out solutions to the railroad grade crossing problem," 49 U.S.C. 20134(a), and to "prescribe regulations and issue orders to ensure the safe maintenance, inspection and testing of signal systems and devices at railroad highway grade crossings," 49 U.S.C. 20134(b). The Railroad Act specifically addresses the pre-emptive effect of the Secretary's regulations and orders, providing that a "State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. 20106.

Also in 1970, Congress directed the Secretary to prepare a comprehensive study of the railway-highway grade-crossing problem and to submit recommendations for legislative action.[6] In the first part of that report, the Secretary surveyed the scope of the problem, its historical roots, and the quite limited success routine federal funding programs had experienced in combating this "major public safety issue." Dep't of Transp. (DOT), *Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* at i (Nov. 1971) (*1971 Report*). The Secretary also documented that nearly 14,000 grade crossings were devoid of any warning signs alerting the public even to the existence of railroad tracks, much less to the possible approach of a train. *Id.* at ii, 24.

In the second part of his report, the Secretary recommended a multi-faceted and cooperative federal/state approach to reducing or eliminating the hazards arising from grade crossings. See DOT, *Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving*

[6] Railroad Act, Pub. L. No. 91-458, § 204, 84 Stat. 972; see also Highway Safety Act of 1970, Pub. L. No. 91-605, § 205(a), 84 Stat. 1742.

the Problem (Aug. 1972) (*1972 Report*). The Secretary recognized that a decision concerning the appropriate warning and protective devices needed for each crossing frequently turns upon unique and individualized conditions, and that it would be necessary to establish priorities in the allocation of funds in the long-term effort to bring all grade crossings up to an adequate level of protection. The Secretary therefore proposed that, "to satisfy the greatest safety needs through a priority approach," crossing improvement projects should be "accomplished on an individual intersection basis," *id.* at 31, and that grouping of intersections "is not appropriate for selecting individual crossings for improvement," *id.* at 76. The Secretary recommended that the States establish a "logical and orderly system" for allocating funds for improvement projects to "individual crossings" on a prioritized basis, *id.* at iii, and, at the same time, that each State "be strongly encouraged to develop procedures to assure that every crossing in the State will be given equal consideration for improvement," *id.* at iv, 92.

The Secretary further recommended, "[a]s a first step in improving grade crossing safety," the imposition of a uniform requirement that every crossing be provided with the minimum warning signs prescribed by the federal Manual on Uniform Traffic Control Devices. *1972 Report* 90; see also *1971 Report* 59, 67. Unlike the long-term program based on a prioritization of individual crossings, the minimum signing program would be undertaken across-the-board without individualized analysis of the appropriate protection ultimately needed for specific crossings.[7] That "mandatory minimum requirement for safety" would afford the public a uniform floor of advance warning at the more than 10,000 grade crossings that lacked any warning signs, the 75,000 crossings equipped only with nonstandard signs, and the more than

[7] *1971 Report* 67 ("Installation of these signs would be made without any prior benefit-cost analysis.").

70,000 grade crossings whose usage would likely rank them low on the States' priority review lists.[8]

b. Congress responded to the Secretary's reports by passing the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, Section 203 (87 Stat. 283) of which created the Rail-Highway Crossings Program, 23 U.S.C. 130 (1994 & Supp. III 1997). That program provides States with federal funds for up to 100% of the cost of the "elimination of hazards of railway-highway crossings." 23 U.S.C. 130(a); 23 C.F.R. 646.212(b). Participating States must develop programs to identify and improve dangerous crossings in a systematic way, and they must "maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. 130(d); see also 23 C.F.R. 924.9.[9] In response to the Secretary's call for the immediate installation of minimum warning signs at all crossings, Congress also directed that each State's program must "[a]t a minimum * * * provide signs for all railway-highway crossings." 23 U.S.C. 130(d).[10]

c. The Secretary, through the Federal Highway Administration (FHWA), has promulgated a series of regulations to implement the Crossings Program. In an "effort to encourage the States to rationalize their decisionmaking," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 667 (1993), the regulations require that accident and traffic-volume statistics, as well as other factors, determine the relative hazards

[8] See *1972 Report* 90, 92; *1971 Report* 67; see also FHWA, *1978 Annual Report on Highway Safety Improvement Programs* 11 (Mar. 1978) [hereinafter, such reports will be cited as "*[year] Annual Report*"].

[9] DOT informs us that all 50 States, the District of Columbia, and the Territories participate in the Crossings Program.

[10] As of 1996, Congress had provided the States with more than $3.12 billion (or approximately 97% of project costs) to improve the safety of public crossings. *1996 Annual Report* IV-3 (Apr. 1996).

posed by different crossings and guide the prioritization and implementation of improvement projects. 23 C.F.R. 924.9(a).

In addition, the regulations address the installation of warning devices at crossings under the States' "[g]rade crossing improvement" program. 23 C.F.R. 646.214(b).[11] First, subsection (b)(1) of that regulation requires that all proposals for the installation of traffic control devices at crossings "comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards." 23 C.F.R. 646.214(b)(1). Although DOT's Manual on Uniform Traffic Control Devices for Streets and Highways (1988) (Manual) does not generally specify when particular warning devices are appropriate, it does require, as a minimum, that all crossings be equipped with two crossbuck signs (Manual § 8B-2) and, except in two narrow circumstances, advance warning signs (Manual § 8B-3).[12] Subsection (b)(1) thus identifies what minimum warning signs are required by 23 U.S.C. 130(d). The Manual anticipates that decisions regarding any additional warning devices, beyond the minimum, for individual grade crossings will be based upon site-specific engineering judgments. See Manual § 1A-4.[13]

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[11] The types of warning devices are classified as either "active" or "passive." Active warning devices are "those traffic control devices activated by the approach or presence of a train, such as flashing light signals [and] automatic gates." 23 C.F.R. 646.204. Passive warning devices are "traffic control devices, including signs," that "indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." *Ibid.*

[12] The crossbuck is the traditional crossed white planks bearing the words "RAILROAD CROSSING" in black lettering that are posted right before a crossing. Manual § 8B-2. The advance warning signs are round yellow signs bearing an "X" with an "R" on each side of the "X". *Id.* § 8B-3. In addition, if the speed limit on the public road crossing the tracks exceeds 40 miles per hour, advance pavement markings must be installed. *Id.* § 8B-4.

[13] The Secretary has incorporated the Manual's provisions into other federal regulations as well. 23 C.F.R. 655.601-655.603. Two amendments to the Manual are pending. See 64 Fed. Reg. 33,806 (1999) (Light Rail Transit Crossings); 64 Fed. Reg. 71,358 (1999) (Traffic Control for Highway-Rail Grade Crossings).

Second, subsection (b)(2) of the regulation provides that, for those crossing improvement projects that are located within or near the terminus of a federal-aid highway project, the FHWA cannot accept the project "until adequate warning devices for the crossing are installed and functioning properly." 23 C.F.R. 646.214(b)(2).

Third, although the regulation does not similarly condition FHWA approval of non-federal-aid highway improvement projects on the installation of "[a]dequate" warning devices, subsection (b)(3) defines what constitutes "[a]dequate warning devices" both for projects under subsection (b)(2) and for any other "project[s] where Federal-aid funds participate in the installation." Subsection (b)(3) defines "[a]dequate warning devices" to include "automatic gates with flashing light signals" if one or more of five hazardous conditions exist or "if a diagnostic team recommends them." 23 C.F.R. 646.214(b)(3)(i).[14] If one of those conditions pertains, gates may be omitted only if "a diagnostic team justifies that gates are not appropriate" and the FHWA concurs with that determination. 23 C.F.R. 646.214(b)(3)(ii).[15]

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[14] Those five hazardous conditions are multiple main line railroad tracks; multiple tracks near a crossing where the approach of another train could be obscured; high speed train operation combined with limited sight distance; a combination of high speeds and moderately high volumes of highway and railroad traffic; or a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of the latter conditions. 23 C.F.R. 646.214(b)(3)(i).

[15] A "diagnostic team" is a group of knowledgeable representatives of the parties of interest in a railroad-highway crossing, who are selected by a State to evaluate individual crossings for improvement. See 23 C.F.R. 646.204; *Crossing Handbook* 79. The team usually includes a highway traffic engineer, a railroad signal engineer, and, as appropriate, representatives of highway design and maintenance agencies and federal, state,

Fourth, for individual crossings where the requirements of subsection (b)(3) are not applicable, "the type of warning device to be installed, whether the determination is to be made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." 23 C.F.R. 646.214(b)(4). The federal regulations thus contemplate continued participation by railroads in the process of selecting and installing warning devices for individual crossings. *Easterwood*, 507 U.S. at 671.[16]

2. a. The Tennessee Department of Transportation participates in the federal Crossings Program. As required by 23 U.S.C. 130, Tennessee established a hazard priority program for grade-crossing improvements, under which it has compiled a prioritized list of the 3459 grade crossings in the State based on a computer assessment of over 50,000 factors. Pet. 8; J.A. 98, 100. When a crossing reaches the top of the list, Tennessee convenes a diagnostic team to evaluate the individual crossing and determine what types of protective devices are needed there. J.A. 100-101.

Tennessee separately implemented a minimum protection program, which, as required by 23 U.S.C. 130(d), provides for the installation of base-level warning signs at all public crossings in the State. Pet. 8; J.A. 98, 102. Unlike the prior-

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and local government officials. *1989 Study* 4-9; see also *1971 Report* 73 (diagnostic teams also may include law enforcement agencies, railroads, and research organizations).

[16] See also 23 C.F.R. 646.216(b) ("preliminary engineering work" may be done by railroads). Railroads generally do not participate on diagnostic teams in Tennessee, apparently because of the logistical difficulties of coordinating the numerous railroad companies that use a given crossing. Nevertheless, the railroads still conduct their own field reviews of Tennessee's proposed improvements, prepare plans, develop and design the projects for improvements, "complete the preliminary engineering," and "complete the construction" of improvements "about 96% of the time." See FHWA, Tenn. Div. Off., *Railroad Grade Crossing Program Process Review* 4, 6, 9 (Dec. 1996). The railroads also can independently review crossing hazards and submit plans for improvement and proposed financing to the State. J.A. 97, 108-109.

ity program, the minimum protection program entailed no individualized engineering judgment about the proper types of warning devices for the particular grade crossings. J.A. 105. In 1987, the Oakwood Church Road crossing in Gibson County was part of a group of 196 crossings in eleven west Tennessee counties that were equipped with the minimum warning signs. J.A. 102-103, 133.

b. Shortly after 5:00 a.m. on October 3, 1993, an unscheduled train of petitioner's struck and killed respondent's husband while he was driving his car at approximately 20 miles per hour across the Oakwood Church Road crossing. Pet. App. 2a-3a; J.A. 50, 66. Respondent sued petitioner for damages under Tennessee statutory and common law. Pet. App. 2a. As relevant here, respondent alleged that petitioner was negligent in failing to install adequate warning devices at the crossing. *Ibid.*

Petitioner moved for summary judgment, contending that respondent's claim was preempted by the Railroad Act and the Secretary's regulations implementing the Crossings Program. The district court denied the motion, finding no preemption because the federally funded warning devices were erected as "only a small part of a minimum protection program designed to place such minimum protection at all Tennessee crossings," rather than as a result of an evaluation of the crossing by a diagnostic team pursuant to the federal regulations governing the priority review program. Pet. App. 34a, 36a. After a trial, a jury found Eddie Shankin 30% negligent and petitioner 70% negligent. *Id.* at 2a.

c. The court of appeals affirmed. Pet. App. 1a-25a. It held that respondent's tort claim regarding the inadequacy of warning devices was not preempted simply because federal funds were expended to post the minimum warning signs. That broad preemption theory, in the court's view, would turn every funding decision "into an eradication of state sovereignty, regardless of how or why the decision was made." *Id.* at 17a. The court also rejected petitioner's argu-

ment that 23 U.S.C. 409 prevents railroads from properly defending such tort actions. Pet. App. 22a.

SUMMARY OF ARGUMENT

Tennessee's receipt of federal funds to install the minimum level of crossing protection required by 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b)(1) does not preempt all state laws requiring the provision of additional protection at individual crossings. First, Congress has crafted a calibrated preemption provision that limits preemption to those regulations issued by the Secretary that cover the subject matter of state tort law. The regulation implementing the minimum protection requirement in 23 U.S.C. 130(d) does exactly the opposite, expressly opening the door to the States' requirement of additional warning devices at crossings. Both the statutory and the regulatory requirement of minimal protection, moreover, appear within a framework of rules that separately directs participating States to undertake particularized reviews of the protections needed by each individual crossing in the State and to install protective devices that are adequate to meet the unique conditions and circumstances present at each crossing. The Secretary's conclusion, confirmed by the statutory and regulatory text, that the minimal-protection regulation is not preemptive should be dispositive.

Second, the text and structure of both Section 130(d) and 23 C.F.R. 646.214(b) make clear that installation of the minimum warning signs does not oust either state officials or railroads of their traditional authority to determine the necessary level of protection for individual crossings. The minimum protection program was designed to establish a federal floor of protection pending the long-term completion of the States' prioritized programs for bringing an adequate level of protection to each crossing. Petitioner's reliance on regulations governing federal funding of that long-term prioritization program, 23 C.F.R. 646.214(b)(3) and (b)(4)—

and this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), interpreting the preemptive scope of those regulations—is thus misplaced. The latter regulations interpose a decisional process that prescribes what protections are adequate for individual crossings and how that determination of adequacy should be made in each case, thereby supplanting with a federally prescribed decisional process the crossing-specific determinations of adequacy normally made by a state official or a jury in a state-law tort suit. The statutory and regulatory requirement of across-the-board minimum protection, by contrast, leaves that state-law process for individualized assessments intact.

Third, the fact that the federal government has provided funding is alone insufficient to trigger preemption. The federal government routinely provides billions of dollars in funding to States without preempting their laws. Rather, as this Court held in *Easterwood*, only substantive regulations that cover the subject matter of state law are preemptive. The only role of federal funds under the Crossings Program is to limit the scope of preemption worked by a substantive regulation.

Finally, the evidentiary constraints imposed by 23 U.S.C. 409 (1994 & Supp. III 1997), which prohibits the use of studies and other documents underlying the States' prioritization program as evidence, do not alter the analysis. Section 409 simply creates a deliberative-process privilege to facilitate a thoroughgoing review of what protective devices are appropriate for crossings. It does not protect the final federal decision to fund a State's priority improvement project. Nor does it preclude the determination whether a crossing improvement was part of a categorized minimum protection program or, instead, was the product of individualized review under 23 C.F.R. 646.214(b)(3) and (b)(4).

ARGUMENT

A STATE'S INSTALLATION, WITH FEDERAL FINANCIAL ASSISTANCE, OF THE MINIMUM ADVANCE-WARNING SIGNS REQUIRED BY FEDERAL LAW DOES NOT PREEMPT STATE LAW REQUIRING ADDITIONAL PROTECTION AT A RAILWAY-HIGHWAY GRADE CROSSING

A. Established Principles Of Preemption Favor Preservation Of Tennessee's Tort Law

Under the Supremacy Clause, U.S. Const., Art. VI, Cl. 2, if a state law conflicts with or frustrates the operation of federal law, the state law must yield. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 (1993). Preemption analysis turns upon congressional intent, as revealed through the text and structure of the statute at issue. *Id.* at 664; see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484 (1996). In this case, Congress spoke directly to the question of preemption in the text of the Railroad Act, expressly providing that the States "may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. 20106.[17] While the Railroad Act grants broad preemptive authority to the Secretary, four considerations weigh against a determination that the Secretary's regulation governing the minimum warning requirement preempts Tennessee tort law.

First, by limiting preemption to those federal rules, regulations, and orders that "cover[]" the subject matter of state law, Congress confined preemption to situations in which the federal regulations "substantially subsume the subject

[17] The preemption provision's reference to a state "law, rule, regulation, order, or standard" encompasses duties imposed through state tort law. *Easterwood*, 507 U.S. at 664.

matter of the relevant state law." *Easterwood*, 507 U.S. at 664. It thus is not enough to show that the federal regulations "touch upon or relate to" the same matters as state law. *Ibid.* The federal rule must substantially occupy the place of state law.

Second, the overall structure of the Crossings Program evidences Congress's intent to preserve to the extent possible the States' historic role in regulating crossing safety. For example, the Crossings Program relies upon the voluntary participation of the States in the funding programs and largely leaves the ultimate selection and implementation of improvement projects to the States. See 23 U.S.C. 130 (1994 & Supp. III 1997); 23 C.F.R. Pt. 924. The Railroad Act mandates that the Secretary "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem." 49 U.S.C. 20134(a); see also 23 U.S.C. 401 (similar, for highway safety programs). Various statutory provisions governing highway safety share with or delegate to the States the exercise of federal regulatory authority.[18]

The preemption provision itself also demonstrates sensitivity to the States' interests. All state laws pertaining to railroad safety remain intact unless and until the Secretary prescribes a regulation covering their subject matter. 49 U.S.C. 20106. Even after federal standards are promulgated, "the states may adopt more stringent safety requirements 'when necessary to eliminate or reduce an essentially local safety hazard,' if those standards 'are not incompatible with' federal laws or regulations and not an undue burden on interstate commerce." *Easterwood*, 507 U.S. at 662. The preemption provision thus "displays considerable solicitude

[18] See 23 U.S.C. 117; Transp. Equity Act for the 21st Century, Pub. L. No. 105-178, § 1305(a), 112 Stat. 107 (to be codified at 23 U.S.C. 106(c)); Intermodal Surface Transp. Efficiency Act of 1991, Pub. L. No. 102-240, § 1016. 105 Stat. 1945. Tennessee has executed an oversight agreement with the FHWA, and the installation of minimum warning signs was made pursuant to that agreement.

for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665.

Third, this Court has long recognized that authority over public safety at grade crossings falls peculiarly within the regulatory power of the States.[19] Where, against such a backdrop, Congress carefully crafts a preemption provision to protect competing state interests and structures a statutory scheme to preserve the States' traditional regulatory role, this Court should hesitate to find preemption "[i]n the interest of avoiding unintended encroachment on the authority of the States." *Easterwood*, 507 U.S. at 663-664. Thus, absent evidence that it was the "clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or of the Secretary that the federal "minimum" level of protection for all grade crossings preempt all state efforts—whether through statute, rule, or common law—to provide protection beyond that federal minimum, state law should not be impeded.

Finally, just as the preemption accomplished by a statute turns on congressional intent, the preemptive scope of federal regulations likewise turns upon the intent of the promulgating authority—in this case, the Secretary of Transportation, acting through the FHWA. Unless foreclosed by the regulation's plain text, the agency's interpretation of its regulations, including their preemptive scope and effect, should be dispositive.[20] Here, the Secretary does not

[19] See, *e.g.*, *Lehigh Valley R.R.* v. *Board of Pub. Util. Comm'rs*, 278 U.S. 24, 34-35 (1928); *Southern Ry.* v. *King*, 217 U.S. 524, 532-533 (1910); *Cleveland, C., C. & St. L. Ry.* v. *Illinois*, 177 U.S. 514, 516-517 (1900); *Railroad Comm'n Cases*, 116 U.S. 307, 334 (1886); see also FHWA, *Traffic Control Devices Handbook* 8-7 (1983) (*Traffic Control Handbook*) ("Jurisdiction over railroad-highway grade crossings resides almost exclusively in the States.").

[20] See *Medtronic*, 518 U.S. at 496; *id.* at 505-506 (Breyer, J., concurring); *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 714-715 (1985); cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997).

construe his regulations to preempt the States from imposing, either by statute or common law, a higher level of protection at a crossing on which federal funds were expended only to install the bare minimum level of protection required by federal law.

B. The Federal Requirement That Minimum Warning Signs Be Posted At All Grade Crossings Does Not Preempt State Laws Requiring Additional Protection At Individual Crossings

1. Congress has mandated that all States receiving federal funds for the "elimination of hazards of railway-highway crossings," 23 U.S.C. 130 (1994 & Supp. III 1997), must "[a]t a minimum * * * provide signs for all railway-highway crossings," 23 U.S.C. 130(d). The Secretary's regulations elaborate upon this requirement by requiring installation of the minimum signage requirements outlined in the Manual. 23 C.F.R. 646.214(b)(1). It is undisputed that Tennessee posted only the minimum warning signs at the Oakwood Church Road crossing as part of an effort to furnish a group of 196 crossings a base level of protection under its "minimum protection program," rather than through an individualized evaluation of that specific crossing under its priority improvement program. See J.A. 98-107; Pet. 8-9; Pet. Br. 19-20.

The federal requirement that States install a minimum level of protection does not preempt the States' ability to mandate enhanced protections at individual crossings. "By its very terms, in fact, the statute purports only to establish *minimum* standards." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 148 (1963); see *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 308 (7th Cir. 1994) ("Minimum is not a synonym for optimum, or even adequate.").[21] And the

[21] See also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("That Congress requires a particular warning label does not automatically pre-empt a regulatory field."); *Hillsborough*, 471 U.S. at 722 n.5

statute and regulation do so in a context that clearly anticipates the installation of additional protective devices by States at those very same crossings. Section 130(d) imposes the minimum signing requirement as the first step in a long-term process under which the States will "conduct and systematically maintain a survey of all" highway-railway grade crossings, "identify those railroad crossings which may require separation, relocation, or protective devices," and "establish and implement a schedule of projects" for such repairs. 23 U.S.C. 130(d).

Similarly, the Secretary's regulation expressly provides that the minimum required by the Manual can be "supplemented to the extent applicable by State standards." 23 C.F.R. 646.214(b)(1).[22] That provision, moreover, immediately precedes a number of other regulatory provisions that govern the States' efforts to provide "[a]dequate warning devices" for individual crossings improved under the States' priority programs. See 23 C.F.R. 646.214(b)(2)-(b)(4). Thus, contrary to petitioner's assertion (Br. 42), even after installation of the minimum warning signs, "the final authority to decide what warning system is *needed*" at individual crossings remains squarely in "the railroad's and the state's hands" (*ibid.* (emphasis added)).

In short, while Congress, through the Crossings Program, intended eventually "that every railroad crossing in America will be provided with modern, up-to-date, protection adequate to the risks of *each such crossing*," H.R. Rep. No. 118, 93d Cong., 1st Sess. 35 (1973) (emphasis added), the minimum protection requirement ensures that, both in the interim and at the conclusion of the priority review process,

("The federal interest at stake here is to ensure minimum standards, not uniform standards.").

[22] See also *Easterwood*, 507 U.S. at 669-670 (Manual is not preemptive of state tort law requiring additional protections); *Traffic Control Handbook* 1-2 (States have imposed "more stringent requirements than the minimums expressed in the [Manual]").

travelers will never again come upon a grade crossing (let alone a train) without some standardized advance warning of the danger.[23] There is accordingly no textual or structural basis for concluding that installation of the minimum warning signs required by federal law preempts States from implementing those additional protective measures that either federal or state law separately requires.[24] To the contrary, the "structure and purpose" of 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b) "as a whole" (*Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)) leave no doubt that Congress intended the imposition of a minimum protection requirement to establish "a floor beneath which [public protection] may not drop—not a ceiling above which [it] may not rise" (*California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987)).

2. Petitioner contends (Br. 26-30) that the Secretary's regulations governing, not minimum, but "[a]dequate warn-

[23] See FHWA, *Federal-Aid Highway Program Manual*, Transmittal 39, at 6 (July 3, 1974) (*FHWA Program Manual*) ("As a *first priority* [under the Crossings Program] each State * * * shall identify those grade crossings at which there are either no signs or nonstandard signs and institute an improvement program to provide signing and pavement markings in compliance with the [Manual] at all grade crossings.") (emphasis added); 23 C.F.R. 924.9(b) (in state plans under the Crossings Program, "special emphasis shall be given to the legislative requirement that all public crossings be provided with standard signing"); *1975 Annual Report* 77 (Dec. 1974) ("First priority shall be given to those grade crossings at which there are no warning signs or nonstandard signs."); 119 Cong. Rec. 28,108 (1973) (Rep. Dorn) ("we must do all that we can on an orderly, priority basis").

[24] The Secretary's annual reports to Congress (see 23 U.S.C. 130(g) (1994 & Supp. III 1997)) likewise separately tracked the States' performance in implementing Section 130(d)'s minimum protection mandate and in the success of their priority improvement programs. See, *e.g.*, *1991 Annual Report* IV-3 (Apr. 1991) (approximately half the States are in full compliance with the minimum signing requirements); *1988 Annual Report* 21 (Apr. 1988) (same); *id.* at D-4 (Tennessee remains out of compliance with minimum standard); *1977 Annual Report*, H.R. Doc. No. 136, 95th Cong., 1st Sess. 11 (1977).

ing devices" for grade crossing improvements, 23 C.F.R. 646.214(b)(3) and (4), preempt any and all state rules requiring the installation of more than minimal protection at individual crossings, as long as the crossing was previously outfitted with minimum signage protection under Section 130(d) and 23 C.F.R. 646.214(b)(1). That argument mixes apples and oranges. Subsections (b)(3) and (b)(4) of 23 C.F.R. 646.214 govern, as the name suggests, what shall be regarded as "adequate" protection for individual crossings as part of a State's prioritized crossing improvement program. By their very terms, those regulations do not apply to across-the-board installations of minimum requirements, because those installations entail no individualized studies of the crossings or determinations that signage that satisfies the minimum requirements for all crossings is also adequate for each particular crossing.

More specifically, subsection (b)(3) directs that gates with flashing lights must be installed at each crossing if a particularized review of conditions reveals either specified operations *at that crossing* that increase the risk of accidents or if "[a] diagnostic team recommends them." 23 C.F.R. 646.214(b)(3)(f). The applicability of (b)(3) thus cannot be determined without a diagnostic team reviewing the particular crossing. Likewise, subsection (b)(4) applies only "where the requirements of § 646.214(b)(3) are not applicable." Again, a decision concerning subsection (b)(3)'s applicability or inapplicability cannot be made without particularized review of the crossing's conditions. Subsection (b)(4) also requires a "determination" by the relevant state official or railroad regarding what would constitute "[a]dequate warning devices" for that crossing.[25] In short, it is only devices

[25] Similarly, the Manual makes clear that, beyond the minimum requirements identified for crossings, "[t]he selection of traffic control devices at a grade crossing is [to be] determined by public agencies having jurisdictional responsibility at specific locations." Manual § 8D-1. "[W]hether any active traffic control system is required at a crossing and, if so, what type is appropriate," will depend on the determination of the responsible authority "[b]ased on an engineering and traffic investigation" of that particular crossing. *Ibid.*

installed on the basis of such individualized determinations, made through the application of a federally prescribed decisional process as part of a State's approved plan for prioritizing and implementing crossing improvements statewide, that qualify as "adequate" warning devices under 23 C.F.R. 646.214(b)(3) and (b)(4).[26]

Indeed, petitioner proves our point with its lengthy discussion (Br. 36-39) of the Secretary's "historic practice of relying on *expert* state determinations in approving the *adequacy* of warning devices" (Br. 39) "*at a particular crossing*" (Br. 36), both prior to and under subsections (b)(3) and (b)(4). (Emphases added.) What petitioner fails to come to grips with, however, is that no such "expert" determination was ever made about the "adequacy of warning devices" at this "particular crossing." J.A. 105-107. Nor, the Department of Transportation informs us, are such determinations generally made as part of States' compliance with the minimum-protection requirement.[27] We similarly agree with peti-

[26] See also Fed. Railroad Admin., *Rail-Highway Crossing Safety Action Plan* 5 (June 1994) (*Action Plan*) ("highway-rail crossings are selected by highway authorities for safety improvements *one at a time*") (emphasis added); *1989 Study* 4-9 ("Based on an engineering and traffic investigation, a determination is made as to which type of traffic control system is required at a crossing. This investigation is made by a diagnostic team."); *FHWA Program Manual* 7 ("The priority schedule of crossing improvements should be based on: *1* The ranking of crossings using the State's current hazard index. *2 An onsite inspection. 3* Accident history.") (emphasis added); *Crossing Handbook* at 63 (priority improvements are to be based on, among other things, "onsite inspections of public crossings"); *id.* at 79 ("Engineering studies should be conducted of those railroad-highway grade crossings that have been selected from the priority schedule" to "review the crossing and its environment; identify the nature of the problem; and, recommend alternative improvements.").

[27] See Pltf. Mem. in Support of Sum. J., Exh. 4 at 8-9 ("No, there was no engineering judgment in the minimum protection program. It was a * * * program whereby we wanted every crossing, regardless, to have a

tioner's State amici (Br. 10-14) that preemption is appropriate when a State has brought the prescribed federal decisional process to bear on a particular crossing and, through that federal program, has determined precisely what "combination of enhancements comprise the *best*"—not minimum —"solution for the safety to the traveling public at *that crossing* location" (Br. 12) (emphases added). We disagree only with the extension of that preemption to the routine, categorized installation of minimum protection at every crossing statewide. Rather, as those amici acknowledge (Br. 10 n.6), until an individual crossing has been improved under a State's priority program, responsibility for that crossing will "continue to be maintained by the railroads."

That limited scope of preemption under subsections (b)(3) and (b)(4) comports with Congress's requirement that a regulation "cover[] the subject matter" of state law before it will be preempted. Through subsections (b)(3) and (b)(4), the Secretary has interposed a prescribed federal decisional process for identifying precisely what protections are "adequate" for individual crossings and has carved out the specific role for railroads to play in that process. See *Easterwood*, 507 U.S. at 670-671 (when the provisions of 23 C.F.R. 646.214(b)(3) and (4) "are applicable," "the Secretary has determined the devices to be installed and the means by

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certain minimum."); *id.* at 37 ("[T]here was no engineering judgment. We were making sure there was a minimum protection at every crossing."); 1 Dep. of W. Cantrell 17 (May 3, 1995) (minimum protection and priority program are "two distinct programs"); *id.* at 8 (minimum program implemented simply by "compil[ing] a list of the crossings statewide"); *Shots*, 38 F.3d at 308-309 (minimum protection installed at 2638 crossings without "a determination by the State of Indiana or the federal Secretary of Transportation as to what safety devices would be adequate at each of the thousands of crossings covered by it"); Pet. for Writ of Cert. 13, *Bock* v. *St. Louis S.W. Ry.*, No. 99-538 ("minimum" protection installation undertaken without gathering information about individual crossings); *Action Plan* 35 ("[L]ow-volume crossings are seldom reviewed by diagnostic teams and any work done at these crossings is usually limited to the installation of passive warning devices.").

which railroads are to participate in their selection"). In so doing, the Secretary's regulation has substantially subsumed the role traditionally played by state officials or by the jury in a tort suit in determining the appropriate level of protection for an individual crossing and assigning a level of responsibility for providing such protection to the railroads.

By contrast, under 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b)(1), implementation of the minimum warning requirement (i) brings no focused federal decisional process to bear on the adequacy of a particular crossing's protective devices, (ii) entails no determination of what protections are "adequate" for a given intersection based on its own particular conditions and usages, and (iii) offers no federally prescribed role for railroads in installing the statutorily prescribed minimum level of protection. Rather, the statutory and regulatory scheme expressly leave to future study and review by the State and/or railroads the decision as to what level of protection each individual crossing actually warrants. See *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985) (where no federal official "has struck a particular balance between safety and quantity" and the "regulations, which contemplated additional state and local requirements, merely establish minimum safety standards," additional protections by local government are not preempted). Section 130(d) and 23 C.F.R. 646.214(b)(1) therefore do not "cover[] the subject matter" of state tort law.[28]

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[28] It is, moreover, difficult to reconcile petitioner's argument (Br. 19-20) that Tennessee's minimum protection program requires the installation of additional warning requirements beyond the federal minimum with petitioner's simultaneous argument that installation of the minimum protection with federal funds preempted any Tennessee law—common law or otherwise—that requires additional protection at grade crossings. In any event, petitioner errs in characterizing the Tennessee program as exceeding the federally prescribed minimum. See n.12, *supra*; J.A. 54 (speed limit for road at issue was 55 mph, requiring pavement markings); see also *1987 Annual Report* 48 (Apr. 1987) (federal minimum requirements are

C. Federal Funding Of The Minimum Warning Devices Alone Is Insufficient To Trigger Preemption

1. Petitioner places great weight (Br. 27-30) on the fact that federal funds financed the installation of the minimum warning signs in this case. But the provision of federal funds is not a "regulation" or "order" of the Secretary that "cover[s] the subject matter" of any state law. 49 U.S.C. 20106. Indeed, the federal government routinely provides billions of dollars to the States without preempting their laws or regulations.

Petitioner contends (Br. 25-30) that, under *Easterwood*, "[f]ederal funding is the touchstone of preemption in this area." Br. 29. *Easterwood* held no such thing. If federal funding sufficed to trigger preemption, then there would have been no need for the Court carefully to parse the various regulations to determine which "cover[ed] the subject matter" of state tort law. See *Easterwood*, 507 U.S. at 667-671. Instead, *Easterwood* held only that, when subsections (b)(3) and (b)(4) "are applicable, state tort law is preempted," 507 U.S. at 670, because the regulation's provision for individualized crossing improvements based on diagnostic studies and particularized analyses "cover[s] the subject matter of state [tort] law which * * * seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings," *id.* at 671.

Correspondingly, *Easterwood* correctly "cast doubt" on the view, which petitioner renews, that group—rather than

"crossbucks, advance warning signs, and pavement markings"). Petitioner is also mistaken in contending (Br. 20 n.12) that the Tennessee minimum protection program "uses the full panoply of passive warning devices," since it does not include stop signs, yield signs, other warning signs, continuously flashing lights, rumble strips, enhanced crossing illumination, stop lines, or supplemental pavement markings. See Manual § 8B-5; FHWA, *Notice of Proposed Amendments to the Manual on Uniform Traffic Control Devices*, Pts. III, IV & VIII §§ 8B.7, 8B.9 (Jan. 6, 1997); 64 Fed. Reg. at 71,365.

individually focused—projects, under which a particular crossing's protective needs were neither reviewed nor implemented, fall within the preemptive scope of subsection (b)(3) or (b)(4). See 507 U.S. at 672. It is only for those crossing improvement "projects in which federal funds participate in the installation of warning devices," based upon the individualized review prescribed by subsections (b)(3) and (b)(4), that it can accurately be said that "the Secretary has determined the devices to be installed *and* the means by which railroads are to participate," *Easterwood*, 507 U.S. at 671, thereby warranting preemption under the *Easterwood* rationale.[29]

The only role played by federal funds in *Easterwood* was to limit the scope of preemption worked by the substantive regulation. It was only after first having identified a regulation that "cover[ed] the subject matter of state law," 507 U.S. at 671, that the Court inquired if the funding "precondition[]" for application of that substantive regulation had been met, *ibid.*

In short, the central flaw in petitioner's argument is its equation of the federally funded, categorized installation of minimum warning signs under 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b)(1), with individual federally funded grade-crossing improvements under which warning devices that actually are determined to be adequate to the particular needs of a specific crossing are installed following specialized

[29] The government's brief in *Easterwood* was similarly limited to grade-crossing improvement projects that installed "adequate" devices under 23 C.F.R. 646.214(b)(3) and (4). See, *e.g.*, Gov't Br. at 8, 12, 23-24, 27 & n.31, *CSX Transp., Inc.* v. *Easterwood*, *supra* (Nos. 91-790 & 91-1206). The brief did not address preemption under the minimum protection program. Indeed, the brief noted that federal law requiring "all crossings [to] be equipped, at a minimum with a cross-buck warning signs" is an "exception" to the general rule that the "Manual does not generally specify when particular safety devices are required." *Easterwood* Br. at 10 (citing Manual § 8B-2 and 23 U.S.C. 130(d)); see also *id.* n.9. The brief thus identifies the limits of its preemption argument.

diagnostic review, under 23 C.F.R. 646.214(b)(3) and (b)(4). It is only in the latter situation that the subject matter of standards of care imposed through state tort law is covered —and thus preempted—because it is only then that the crossing-specific determination of adequacy normally made by a jury or state officials is supplanted by a similarly individually focused federal decisional process.

2. Petitioner argues (Br. 36-40) that, by statute and regulation, the Secretary could not finance the State's installation of minimum warning signs without first finding that the minimum was also "adequate" protection for each of the hundreds or thousands of crossings involved in a State's minimum improvement program. Petitioner relies, in particular, upon 23 U.S.C. 109(e), which provides in relevant part that

> No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2, of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing * * *.

The short answer is that Section 109(e) has no application to this case, or to the approximately 80% of all public grade crossings off the federal highway system (*1971 Report* i, 26), because they are neither "Federal-aid highway[s]" (23 U.S.C. 101) nor "highway[s] affected under chapter 2" (23 U.S.C. 201 *et seq.*). See J.A. 128; *Easterwood*, 507 U.S. at 670 n.10.[30]

[30] The fact that, in 1976, Congress authorized the Secretary to fund off-system projects "subject to all the provisions of chapter 1 of title 23," Pub. L. No. 94-280, § 203(a), 90 Stat. 452, does nothing to advance petitioner's case (see Pet. Br. 10-11 n.7). That provision was repealed two years later and replaced with an authorization to fund projects "on any public road" without any reference to chapter 1 or Section 109(e). Pub. L. No. 95-599, § 203(a) and (b), 92 Stat. 2728.

The longer answer is that, even if 109(e) did apply, it does not tie the Secretary's hands in the manner petitioner proposes. Section 109(e) does not restrict the Secretary to funding only those projects that immediately accomplish all aspects of highway safety. Rather, Section 109(e) requires only that the Secretary find that the protective devices being installed are "adequate" "at that time." The statute thus dictates a contextual and time-sensitive inquiry.[31] The Secretary may not fund minimum warning-sign installation programs unless the State proposes to install the "proper" minimum warning signs prescribed by federal law (*i.e.*, the Manual, 23 C.F.R. 646.214(b)(1), and 23 U.S.C. 130(d)). Likewise, the Secretary may not fund individual crossing improvement projects unless they propose to install protective devices that both conform to the Manual and are adequate for the needs of the particular intersection (*i.e.*, lights and gates for subsection (b)(3) crossings). Under petitioner's cramped reading of 109(e), by contrast, the Secretary could furnish no funds at all for the minimum signage program that Congress made its "first priority" under 23 U.S.C. 130(d), *FHWA Program Manual* 6, because such programs by definition install minimum rather than adequate protection. This Court should hesitate to read Sections 109(e) and 130(d) in such self-defeating terms.[32]

[31] See *Medtronic*, 518 U.S. at 502 (opinion of Stevens, J.) ("the meaning of words must always be informed by the environment within which they are situated").

[32] Petitioner's invocation (Br. 35; Pet. 7) of 23 C.F.R. 630.106, which governs the authorization of federal funds, fails for the same reason. The "prerequisite requirements" of federal law connote the same contextual and project-sensitive interpretation as Section 109(e). See *Martin* v. *OSHRC*, 499 U.S. 144, 150-151 (1991) (courts accord substantial deference to an agency's interpretation of its own regulations). Because 23 U.S.C. 109(e) neither means what petitioner reads it to mean nor has any relevance to this case, the fact that some prior versions of the regulation (see 23 C.F.R. 630.114(b) (1988)) included an "*e.g.*" reference to 109(e) in dis-

3. Finally, petitioner's position requires the Court to ignore the very rationale for preemption upon which it relied in *Easterwood*, and subverts, rather than fosters, the railroad safety concerns that animate the Railroad Act and the Highway Safety Act. In *Easterwood*, this Court explained that a "scheme of negligence liability" could "complement" the Secretary's regulations governing the prioritization of crossing hazards "by encouraging railroads—the entities arguably most familiar with crossing conditions—to provide current and complete information to the state agency responsible for determining priorities for improvement projects." 507 U.S. at 668.

Transforming the States' compliance with Congress's first priority of providing minimal warning signs at crossings nationwide into a blanket immunization for the railroads from tort liability, as petitioner advocates, would defeat the goal of full informational disclosure and sharply reduce the railroads' incentive to recommend, endorse, or support crossing improvements. Under petitioner's theory, the State's erection of crossbucks and the minimum warning signs at a crossing would relieve the railroads of all responsibility to cooperate with diagnostic teams, to alert the State that their trains have sharply increased their speed or frequency, or to report an increased number of school buses at a crossing due to the construction of a new school nearby.[33] The impact of petitioner's theory, moreover, would be sweeping. Currently, more than one-half of all public crossings are equipped with only the minimum warning signs. *Audit Report* 3. It thus would be "spectacularly odd" (*Medtronic*, 518 U.S. at 491 (opinion of Stevens, J.) to conclude that Congress intended the provision of limited financial assistance[34] to the States' minimum programs

cussing the authorization of funding for highway projects likewise does not assist petitioner's argument (Pet. Br. 16, 35).

[33] See *1971 Report* 55 (in one year, school buses were involved in 255 near misses with trains; trucks carrying flammable materials were involved in 203 near misses).

> to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings [subject to such agreements] or otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings, when no one in the federal government ha[s] made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal standards.

Shots, 38 F.3d at 309.[35]

D. The Evidentiary Privilege Created By 23 U.S.C. 409 Comports With The Preservation Of State Tort Law

Finally, petitioner contends (Br. 42-48) that Tennessee's tort law should be preempted because 23 U.S.C. 409 (1994 & Supp. III 1997) restricts the ability of railroads to prove that the required diagnostic review process has been undertaken. Section 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title * * * shall not be subject to discovery or admitted into evidence in a

[34] The average cost of each of Tennessee's minimum protection projects in 1987 was approximately $665. J.A. 128.

[35] Because the regulation applies only if federal funds participate in the "installation of the devices," 23 C.F.R. 646.214(b)(3); see also 23 C.F.R. 646.214(b)(2), preemption does not occur under the Secretary's regulations until the warning devices approved as adequate for the individual intersection are actually installed and operational. See *St. Louis S.W. Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994), cert. denied, 514 U.S. 1110 (1995).

> Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Petitioner misunderstands the operation of that privilege. Congress enacted Section 409 in 1987 (see Pub. L. No. 100-17, Title I, § 132(a), 101 Stat. 170) to ensure that the States' priority lists for crossing improvements would not become a fount of litigation against state officials and to promote the candid sharing of information about individual crossing conditions by knowledgeable parties.[36] The rule thus functions as a deliberative-process privilege, protecting the data, communications, and underlying information compiled by the parties involved in crossing improvements.

Nothing in either the text of Section 409 or the purpose of the privilege precludes the introduction of evidence concerning the final decision made by regulatory authorities, the final determination regarding appropriate protective devices made by a diagnostic team, or the mere fact that a specialized assessment of an individual crossing was or was not made. Indeed, in this case, witnesses, who were cognizant of the limitations of Section 409, properly testified to the fact that no engineering study was made at the Oakwood Church Road and that the signs were installed as part of a minimum protection program rather than a priority improvement project. See J.A. 100-107, 115-117, 125-126. Similar evidence apparently has been introduced in other cases. See n.27, *supra*; *Bock* v. *St. Louis S.W. Ry.*, 181 F.3d 920, 921 (8th Cir. 1999) (evidence that diagnostic team inspected particular crossing), petition for cert. pending, No. 99-538. Courts accordingly may entertain the evidence needed to make a proper preemption determination in tort cases arising from crossing accidents.

[36] See Pet. App. 20a; *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *Sawyer* v. *Illinois Cent. Gulf R.R.*, 606 So.2d 1069, 1074 (Miss. 1992); Fed. Railroad Admin., *Rail-Highway Crossing Safety Report* 15 (July 1985).

Beyond that, petitioner's (Br. 4-5, 47; Pet. 18-19) and the State amici's (Br. 15-17) objections to the supposed unfairness of holding railroads responsible in tort law for the inadequacy of warning devices are misdirected. Unless a regulation of the Secretary covers the subject matter of state law, the federal Crossings Program leaves state tort law where it finds it.[37] The federal government neither requires nor prohibits States to perpetuate the historical tort liability of railroads for failing adequately to warn the public of the danger created by the operation of their trains.[38]

[37] The States, moreover, may have good reasons for continuing to impose tort liability on the railroads. As this Court explained in a decision sharply narrowing the authority on which petitioner relies (see Br. 5, 6 (citing *Nashville, Chattanooga, & St. Louis Ry.* v. *Walters*, 294 U.S. 405 (1935)):

> The railroad tracks are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.

Atchison, Topeka & Santa Fe Ry. v. *Public Util. Comm'n*, 346 U.S. 346, 353 (1953); see also *1971 Report* A31 ("[W]hile railroads are private corporations, they are affected with a certain public interest, and are operated for public purposes. Railroad companies are for certain purposes quasi-public corporations * * * regulated by the public to serve the public convenience.").

[38] Similarly, the State amici's concerns (Br. 3 & n.2) about suits against the States have no bearing on the question presented here. The federal laws at issue neither create private causes of action against the States nor require the States to surrender their sovereign immunity as a condition of receiving federal funds.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 99-312

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as
Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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Respondent respectfully submits this Supplemental Brief to address a new argument and a new piece of non-record material raised for the first time in Petitioner's Reply Brief. *See* S. Ct. R. 25.5.

* * * *

Petitioner contends for the first time in its Reply Brief that "it is often the case that a diagnostic team has studied a crossing in *prior* years and determined that active devices are unnecessary," citing as supposed support for this proposition a letter written by the Tennessee Department of Transportation ("TDOT") in 1983 (Petr's Supp. Lodg. Tab C, Exh. 6) regarding the Oakwood Church Crossing. Reply Br. 10. Petitioner never made this argument, or cited to this document, at any time in this litigation prior to filing its Reply Brief. Nor is that surprising. The letter provides no support for the claim that diagnostic teams regularly study crossings other than under the hazard program, and the testimony in this case (which Petitioner fails to discuss) proves exactly the opposite. *See* Resp. Br. 31-36.

Moreover, contrary to Petitioner's representation in its Reply Brief, this letter is not even part of the record in this case. Petitioner cites the letter correctly as an exhibit (No. 6) to the second day of the deposition of Terry Cantrell, but is wrong in representing that the exhibit or this portion of the Cantrell deposition is part of the record. Except for isolated excerpts not relevant here, only the transcript of the first day of the deposition (May 3, 1995) and exhibits from that day were made part of the record. *See* JA 7 (docket entry no. 52 (record also on file with this Court)). The evidentiary status of the letter is important because Petitioner may be attempting obliquely to challenge the district court's finding that "there is no evidence in the record that the Oakwood Road crossing was the subject of a study by a diagnostic team" and that "there is no evidence in the record that there were specific determinations that such passive warning devices were adequate for particular

crossings." Cert. App. 35a, 36a. Presumably, Petitioner never attempted to prove the contrary through this letter because, as the Solicitor General's brief explains, States act as the federal government's agent only when upgrading crossings to include active warning devices under the hazard program. Br. of United States 11 (installation of active devices under hazard program "supplant[s] with a federally prescribed decisional process the crossing-specific determinations of adequacy normally made by *a state official* or a jury in a state-law tort suit" (emphasis added)), 21 (same). The diagnostic team evaluation referenced by the letter, by contrast, was done solely by TDOT at the request of a Congressman, and thus does not represent a *federal* action of any kind.

Even if the Court were to consider this non-record material, it supports *Respondent's* description of the hazard and minimum protection programs. The letter is a response to a April 27, 1983, inquiry from a Congressman (also not part of the record but nonetheless lodged by Petitioner, *see* Petr's Supp. Lodg. Tab C, Exh. 5) stating that the railroad that owned the crossing at the time wished to install lights but would not do so because of the cost. The railroad had asked the Congressman to contact the TDOT "to see if the crossing light could be funded through the grade crossing program," *i.e.*, the hazard program. Jones specifically recognized "that the installation of crossing lights are [sic] funded on a priority basis," and asked TDOT to "please review this particular crossing to determine its priority." TDOT responded *not* that the crossing did not merit advanced warning devices, but instead that the crossing was not high enough on the priority list to qualify for the limited available federal funding. The "diagnostic team investigation" revealed that "[t]his crossing does not have sufficient train/vehicle exposure to *qualify* for active warning devices (lights, bells, etc.), nor is there a sight-distance problem at the

crossing" (emphasis added). Instead, "[t]he crossing will be upgraded with passive 'Railroad Advance Warning' signs, *pavement markings*, etc. in the Department's ongoing program for *minimum grade crossing protection* which is underway state-wide" (emphasis added).

This exchange of letters is proof of Respondent's description of the hazard and minimum protection programs in several respects.

1. The letters establish that States upgrade crossings under the hazard program based on the availability of limited federal funds, *not* based on a determination that the crossings not to be upgraded are adequately protected with minimum protection devices. TDOT's response explains that federal funds were being allocated to crossings that the State's computer ranking indicated were more dangerous, not that the Oakwood Church Crossing did not need lights and gates or that, if more funds were available, the State would not install advanced protection. *See also* Affidavit of Alvin Zager, Exh. 3 to May 3, 1995, deposition of Terry Cantrell (docket entry no. 52) (explaining that it was the limited amount of federal funds that determined the number of crossings upgraded each year under the hazard program).

2. Railroads remained free to install advanced devices with their own funds at crossings not upgraded under the hazard program, as Petitioner's predecessor considered doing at the Oakwood Church Crossing. (Indeed, the letter strongly suggests that the railroad that owned the crossing at the time, Petitioner's predecessor in interest, recognized that the crossing was dangerous and merited advanced protection.)

3. The minimum protection program is a separate

initiative under which no determination of adequacy was made. TDOT's letter clearly distinguishes between the hazard program under which crossings were upgraded through the use of limited federal funds (which was the subject of the Congressman's inquiry) and the minimum protection program (which TDOT stated would be utilized in installing passive warning devices).

4. To the extent the letter does set forth what is necessary to protect the crossing, it identifies a warning device – "pavement markings" – that, as discussed in Respondent's Brief at 20-22, were required but not installed.

5. The letters demonstrate that the mere installation of minimum protection devices does not give rise to preemption because changed conditions, such as increased traffic volumes and reduced sight distances as a result of construction or the growth of vegetation, can render a crossing substantially more hazardous over time. Notwithstanding TDOT's representations in the 1983 letter, minimum protection devices were not installed at the Oakwood Church Crossing until 1987 (except for pavement markings which were never installed), and the accident in this case did not occur until 1993. It is not surprising that in the decade between the State's review of the crossing and the accident, conditions at the crossing became "ultrahazardous," as the trial testimony established. *See* Resp. Br. 12.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 23, 2000

No. 99-312

IN THE SUPREME COURT OF THE UNITED STATES

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner

v.

DEDRA SHANKLIN, Individually and as
Next Friend of Jessie Guy Shanklin,
Respondent.

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On Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

MOTION OF THE STATE OF KANSAS AS *AMICUS CURIAE* FOR ADDITIONAL TIME FOR ORAL ARGUMENT AND TO PARTICIPATE IN ORAL ARGUMENT IN SUPPORT OF RESPONDENT SHANKLIN

Pursuant to this Court's Rule 28.3, 28.4, and 28.7, the State of Kansas, as *amicus curiae*, move that the Court grant an additional ten minutes for oral argument in this case so that Kansas, through its State Solicitor, Stephen R. McAllister, may argue on behalf of those States that support the Respondent Shanklin in this case. This motion has the consent of both Respondent Shanklin and the State of North Carolina, which filed the *amici* brief in support of Respondent Shanklin to which Kansas is a signatory. Kansas respectfully suggests that, in the unique circumstances of this case, argument by Kansas would provide assistance to the Court not otherwise available and would aid the Court in its resolution of the preemption issues presented.

I. Eleven States, including Kansas, joined the brief filed by North Carolina in this Court on January 28, 2000, supporting Respondent Shanklin in this federal preemption case. With all due respect, the interests of these twelve States are not currently represented adequately through the arguments the Court is scheduled to hear in this case.

A. In late January, shortly before the brief of North Carolina and the *amici* states was filed, this Court granted a motion by the State of Texas for divided argument as an *amicus* in support of Petitioner Norfolk Southern Railway Company. Texas previously filed an *amicus* brief on behalf of five states, supporting the Petitioner railroad. The time granted to Texas will come from the Petitioner's thirty minutes.

B. Also, in January, this Court granted a motion by the United States for divided argument as an *amicus* in support of Respondent Shanklin. The United States recently filed its *amicus* brief in support of Respondent Shanklin. The time granted to the United States will come from Respondent's thirty minutes.

II. This case is unique in that states have participated as *amici* on both sides of this case and that the United States also is participating as an *amicus*.

A. It is clear that the *amici* states represented by the State of Texas--embracing as they do federal preemption on the basis of mere federal spending--are not remotely representing the interests asserted by the *amici* states Kansas would represent at oral argument if the Court grants this motion. Nor does the United States, in preemption cases generally or this case in particular, represent the interests of the States. Although the United States may be willing to agree that Congress did not intend to preempt state law in the circumstances of this case, the United States is hardly interested in curtailing the overall nature and scope of Congress's power to

preempt state law. Thus, neither of the *amici* to whom the Court currently has granted argument time represent the interests of the twelve states that oppose federal preemption in this case and federal preemption of traditional state law in general.

B. If the Court grants this motion, Kansas would present an argument along the following lines: Although the statutory scheme at issue here makes clear that federal funding of safety improvements made at railroad crossings is a necessary condition for federal preemption, the Sixth and Seventh Circuits are correct that it is not a sufficient condition for such preemption. This Court should reject the doctrine of "constructive approval" in determining whether federal law preempts all state laws that otherwise apply to railroad crossings.

The statute itself, which is the only provision of law that Congress enacted, does not contain a clear statement of congressional intent to preempt state tort law on the basis of the mere expenditure of federal funds to install safety devices at railroad crossings. When the state's traditional police powers are at stake, a meaningful clear statement requirement is essential to respect the state's interests in protecting its citizens. Moreover, to the extent Congress desires to preempt state law, it must act under one of its affirmative Article I powers, such as the Commerce Clause. Congress and federal agencies lacks the authority to preempt state law in exercising the spending power, which operates in the nature of a contract with the states, thus creating "waiver" questions, not preemption issues.

Congress retains ample constitutional authority to regulate safety at railroad crossings. But it must do so in the constitutionally appropriate way, by using its commerce power directly. The mere expenditure of federal funds is not an acceptable proxy for exercising that power.

III. If this motion is granted, Stephen R. McAllister, the Kansas State Solicitor, will

present the oral argument on behalf of Kansas and the *amici* states that support Respondent Shanklin.

A. Solicitor McAllister served as a law clerk to Associate Justice Byron R. White and Associate Justice Clarence Thomas, and has previously argued before this Court in *O'Gilvie v. United States*, 519 U.S. 79 (1996), and *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999). He also is a tenured faculty member at the University of Kansas School of Law and will become that school's next dean on July 1, 2000. It is Kansas's hope that Solicitor McAllister's experience would provide assistance to the Court in its resolution of this case.

B. Kansas is aware that this Court's Rule 28.3 directs that "[a]ny request for additional time to argue shall be presented by motion under Rule 21 no more than 15 days after the petitioner's or appellant's brief on the merits is filed . . . ." Respectfully, Kansas urges the Court to accept this motion as timely filed under the unique circumstances of this case. With all due respect, Rule 28.3 appears to contemplate requests by the *parties* for time in excess of their usual "one-half hour for argument." Although technically the Rule may apply to Kansas's motion in this case, there are several considerations which suggest that Kansas could not reasonably have filed this motion within the time specified by Rule 28.3.

1. At the time of the deadline specified in Rule 28.3, Kansas had no way to know whether Texas would file, or this Court would grant, a motion seeking divided argument with the Petitioner. Nor, at that time, did Kansas or the parties know whether the United States would file an *amicus* brief in this case with the likely result that the United States would ask for and receive time for oral argument.

2. Second, it is more reasonable in general, and presumably more useful to the Court,

for *amici* to wait until they actually file an *amicus* brief before making a motion for divided argument or additional time for oral argument. With all due respect, Kansas suggests that ruling on such motions might be more difficult for the Court without the benefit of the actual *amicus* brief. Furthermore, if read to apply to *amici* in the circumstances presented in this case, Rule 28.3 would encourage *amici* to file such motions much earlier in the case than is reasonably necessary and, unlike Rule 28.4 governing requests for divided arguments, unfairly advantage those *amici* that support petitioners while simultaneously disadvantaging those *amici* that support respondents.

Conclusion

For the foregoing reasons, the State of Kansas respectfully requests that this Court grant Kansas ten minutes of oral argument in this case, to be added to the one hour already allotted for oral argument.

Respectfully submitted,

STEPHEN R. McALLISTER
Kansas State Solicitor

January 31, 2000

NORFOLK SOUTHERN RAILWAY COMPANY v. DEDRA SHANKLIN.
NO. 99-312

CERTIFICATE OF SERVICE

I, Stephen R. McAllister, a member of the bar of this Court, hereby certify that all parties required to be served have been served pursuant to this Court's Rule 29.3 by mailing a copy of Kansas's Motion for Additional Time for Oral Argument and to Participate in Oral Argument in Norfolk Southern Railway Company v. Shanklin, No. 99-312, by first class United States mail, postage prepaid, this 31st day of January, 2000, addressed to the following:

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No. 99-312

Supreme Court, U
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IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as
Next Friend of Jessie Guy Shanklin,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. One such matter is grade crossing safety and litigation resulting from accidents between trains and motor vehicles at grade crossings when it involves issues that may significantly impact AAR members.

Grade crossing litigation typically involves multiple claims of negligence against the railroad (e.g., excessive train speed, failure to sound the whistle, failure to keep a proper lookout, failure to remove obstructions, such as vegetation, from the right-of-way, and failure to maintain the warning devices at the crossing).[2] In addition, allegations, like those made in the case at bar, that the railroad negligently failed to provide adequate warning devices at the crossing, are virtually a given in crossing litigation. Such an allegation is typical even where federal funds have been used to install warning devices at the crossing, notwithstanding that the railroad has no decision making authority regarding the need for or selection of a particu-

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[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

[2] A number of such claims (unrelated to this appeal) were submitted to the jury in this case.

lar device, and cannot be required to pay for the upgrade (*see infra* note 13).

Prior to 1973, there was no uniform system for determining the need for warning devices at railroad grade crossings despite the well-recognized interstate character of rail operations. However, in 1973 Congress and the Secretary of Transportation created the Federal Grade Crossing Safety Program with the passage of the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250 (codified at 23 U.S.C. § 130), which for the first time created a nationally uniform system for surveying railroad grade crossings and determining the need for warning devices at those crossings. The Program has been one of the most successful highway safety programs ever implemented. From 1974 through 1998, the number of injuries and deaths resulting from accidents between trains and motor vehicles at public grade crossings declined by 64 percent and 71 percent respectively. *See* Federal Railroad Administration, *Highway-Rail Grade-Crossing Accidents,* Calendar Year 1974 p. 7 (1975) (Table 10) and Federal Railroad Administration, *Railroad Safety Statistics, Annual Report 1998* ch. 7, p. 6 (July 1999) (Table 7-1). (*1998 Safety Statistics*). The Department of Transportation has concluded that "[b]ased on evaluations and improvements provided by the states, the Rail-Highway Crossing Program has helped prevent more than 8,500 fatalities and 38,900 injuries since 1974." [3]

As of 1998, there were 158,590 public grade crossings on the nation's rail system. *1998 Safety Statistics*, ch. 9, p. 6 (Table 9-1). Because grade crossings have such a pervasive presence on the rail network, the establishment and preservation of clear and uniform rules regarding the

[3] U.S. DOT, Federal Highway Administration, *The 1996 Annual Report on Highway Safety Improvement Programs*, at S-2 (April 1996).

duty of the various entities with an interest in highway/grade crossing safety to determine the need for and to install adequate warning devices at railroad grade crossings is a matter of great importance to AAR's member railroads.

AAR filed two briefs with this Court in *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993), a case which addressed the question of when the Federal Railroad Safety Act of 1970 (FRSA) Pub. L. No. 91-548, 84 Stat. 971, and regulations issued by the Secretary of Transportation which implemented the Federal Grade Crossing Safety Program, preempt state-law duties, including tort claims alleging that the railroad negligently failed to determine the need for, and install, adequate warning devices. However, despite this Court's clear holding in *Easterwood* that such state law claims are preempted when federal funds participate in the installation of warning devices at railroad grade crossings pursuant to regulations issued by the Secretary of Transportation, the issue in this case continues to be raised with regularity in grade crossing litigation in courts throughout the nation. A minority of courts, such as the Sixth Circuit below, employ a test for preemption far afield of the *Easterwood* holding. The lack of uniformity with which the minority of lower courts have interpreted *Easterwood* has created great uncertainty regarding the role and duty of railroads with respect to grade crossing warning devices.

This case also has serious ramifications for the role of railroads in the Federal Grade Crossing Program. Since its inception in 1973, AAR members have been active participants in the Program, working with the states, which implement the Program, under which crossings are improved, on a priority basis, using federal funds.[4] Rail-

[4] Prior to the institution of the Program, AAR worked with USDOT to create a Rail-Highway Grade Crossing Inventory for

roads have a well defined role in the Program, under which they provide rail-related data regarding crossings, and participate on state-convened diagnostic teams where invited. However, their role does not include responsibility for selecting warning devices; nor does the railroads' role include overseeing the states' or Secretary's roles in, or implementation of, the Program. Nonetheless, the decision below would saddle railroads with the additional responsibility of assuring that the Program's requirements were complied with in all respects by state and federal agencies, with the adverse consequence of exposure to start tort claims if a court determines non-compliance by state and/or federal authorities—a strange consequence indeed.

Because preemption in the context of grade crossing litigation has remained an important and recurring issue facing railroads, AAR has maintained a continuing interest in the uniform interpretation and application of the *Easterwood* decision by lower courts.[5] AAR can play a valuable role in bringing to this Court's attention the railroad industry's perspective on the issues raised by this important case.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

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all crossings in the United States. The Inventory data for each crossing are kept current through ongoing updates, and serve as an important source of information for use in the implementation of the Grade Crossing Program by federal and state authorities.

[5] Since *Easterwood* was decided, AAR has participated as *amicus curiae* in a number of cases in both state and federal court where the application of *Easterwood* was at issue. *See e.g., Hester v. CSX Transp., Inc.*, 61 F 3d 382 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 815 (1996); *Bock v. St. L. Southwestern Ry. Co.*, 181 F.3d 920 (8th Cir. 1999); *Union Pac. R.R. v Sharp*, 952 S.W.2d 658 (Ark. 1997); *Pearson v. Colombus & Greenville Ry. Co.*, 672 So.2d 773 (Miss. App. 1995).

SUMMARY OF THE ARGUMENT

In *Easterwood*, this Court held that the regulations at 23 C.F.R. § 646.214(b) cover the subject matter of the selection and installation of grade crossing warning devices. When federal funds participate in the installation of such a device, these regulations become applicable and state law imposing a duty to install additional or different devices is preempted in accordance with FRSA's express preemption provision. 49 U.S.C. § 20106. At the trial in this case petitioner proved that federal funds were used to install the warning devices at the crossing where the accident occurred, and therefore, respondent's claim that petitioner negligently failed to install adequate warning devices should have been preempted as required by *Easterwood*. However, the Sixth Circuit found no preemption. Its decision, which requires as an additional condition of preemption that a railroad defendant show that a federal official specifically approved of the particular crossing devices installed, is a misapplication of *Easterwood*, premised on a failure to understand both the operation of the express preemption provision of FRSA and the nature of the Federal Grade Crossing Program.

The Federal Program, which has saved thousands of lives since its inception in 1973, established a national, uniform and rational system under which states survey the rail-highway grade crossings within their borders, determine the type of warning devices needed at each crossing, and upgrade crossings on a priority basis. The Program relies on the expertise of state highway officials to implement the Program's various elements, and affords them flexibility to exercise their judgment in carrying out these tasks. The Program assigns specific roles to the railroads, which include providing and updating rail-related information about the crossings over which they

operate, but does not include the selection of warning devices for those crossings.

The states' implementation of the Program is subject to federal oversight, and the requirements of § 646.214(b) where federal funds are used to improve crossings. Before federal money can be used to improve a crossing, approval of the FHWA is required and the state must comply with all federal requirements. Federal funds are approved for use in crossing upgrades when the federal government is satisfied that the state has met its obligations under the Grade Crossing Program; however, the Program does not require that federal officials scrutinize each crossing at which federal funds are used and grant an individualized approval for the devices installed.

In this case, the crossing was improved with passive warning devices using federal funds—as have thousands of crossings characterized by low traffic volumes—in accordance with the ranking and priority assigned by the state under the Grade Crossing Program. Notwithstanding the proven effectiveness of the Federal Program, respondent and the Sixth Circuit would have juries, sitting in state law tort actions, and informed by hired expert witnesses, step into the shoes of, and second guess the decisions of federal and state officials here and elsewhere. Railroads and other defendants in these state law actions would not even be able to defend themselves by showing the process by which state highway officials evaluated and ranked, or set priorities for upgrading, a crossing, because introduction of such evidence is prohibited by 23 U.S.C. § 409. However, Congress in its wisdom has chosen to establish an effective, uniform, national system for improving crossing safety, and, where federal funds participate in the installation of warning devices, has expressly preempted state law duties requiring that different or additional devices be installed.

ARGUMENT

I. THE SIXTH CIRCUIT MISINTERPRETED THIS COURT'S DECISION IN *CSX TRANSP., INC. v. EASTERWOOD*

A. The Decision Below Is Grounded in a Misinterpretation of FRSA's Preemption Provision

> The scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate. . . . Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices were necessary at a federally-funded crossing is therefore preempted.

Brief for the United States at 27, *CSX Transp., Inc. v. Easterwood* (emphasis in the original). The Solicitor General's statement was a cogent and succinct anticipation of this Court's ruling in *Easterwood*, which held that:

> for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which the railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

507 U.S. at 671. The decision below flies in the face of this straightforward holding.[6]

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[6] *Shanklin v. Norfolk Southern Ry. Co.*, 173 F.3d 386 (1999). On the other hand, *Easterwood* has been faithfully followed by the Fifth Circuit (*Hester supra*), the Eighth Circuit (*Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (1996); *Bryan v. Norfolk &*

In order to achieve a result it deems desirable, the Sixth Circuit has imposed another condition to the clear-cut test for preemption established in *Easterwood*: in addition to establishing that federal funds participated in the installation of the devices, the defendant also must prove that the federal government made a specific determination, approving as adequate, the warning devices installed at the particular crossing that is the subject of the lawsuit. 173 F.3d at 397. This improper reading of *Easterwood* is based on a fundamental misunderstanding of the test for federal preemption under FRSA and its application to grade crossings as determined by this Court in *Easterwood*.

FRSA and *Easterwood* make clear that preemption occurs when the USDOT issues regulations covering the subject matter of the state law claim. Under the plain language of FRSA, preemption occurs at the time the Secretary "prescribes a regulation" that covers the subject matter.[7] *Easterwood* held that the regulations at 23 C.F.R. § 646.214(b) cover the subject matter of determining the need for, and installation of, grade crossing warning devices, and establish a process for making that

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Western Ry. Co., 154 F.3d 899 (1998), *cert. dismissed*, 119 S.Ct. 921 (1999); *Bock supra*), the Tenth Circuit (*Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (1996)) and the Eleventh Circuit (*Ingram v. CSX Transp., Inc.*, 146 F.3d 858 (1998)), as well as numerous federal district courts, and by the only two state Supreme Courts which have considered the issue. *See Sharp supra*; *Lubben v. Chicago Cent. & Pac. R.R.*, 563 N.W.2d 596 (Iowa 1997).

[7] The preemptive language of FRSA reads as follows:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation or order related to railroad safety *until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter* of the State requirement.

49 U.S.C. § 20106 (emphasis supplied).

determination *whenever* federal funds are authorized and participate in the installation of those devices at a crossing. Once it has been established that these regulations are applicable, state law is preempted. No further conditions need be satisfied, because at the time the regulations become applicable, Congress' express intent to preempt state law becomes effective. The Sixth Circuit's reading of additional conditions and caveats into *Easterwood* is improper and should be reversed.

B. Preemption of State Law Duties to Select and Install Grade Crossing Warning Devices Occurs Wherever Federal Funds Participate in the Installation of Such Devices

As petitioner argues, once it has been established that federal funds participated in the installation of warning devices at a grade crossing, putative state law duties to select and install different devices, whether imposed on railroads or any other party (such as a state or its highway agency), are preempted. The rule established by this Court in *Easterwood* focuses on the use of federal funds because it is the participation of such funds that triggers the applicability of the regulations which cover the subject matter of the adequacy of crossing devices. *See* 23 C.F.R. § 646.214(b)(3) & (4) ("*Adequate warning devices* . . . on any project where federal funds participate in the installation of the devices are to include . . . "). Nothing in either FRSA or *Easterwood* suggests that preemption is triggered only at a later time, or by a different event, such as the occurrence of a specific determination by the federal government that a particular device provides adequate warning at a specific crossing.

Federal funds cannot participate or be expended on any grade crossing project without approval of the Federal Highway Administration (FHWA). 23 C.F.R. 646.216 (e)(1) & (2). Because FHWA approval of a grade

crossing improvement project is required before federal funds can participate,[8] evidence of federal funding is proof of FHWA approval, including any necessary determination or concurrence as to the warning devices being installed.[9] Hence, where federal funds have participated, state law may not impose independent duties with respect to the selection and installation of warning devices.

The Sixth Circuit's decision, which follows the Seventh Circuit's decision in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (1994),[10] appears to be based on the mistaken belief that if the *Easterwood* test is followed, "no one is responsible for the safety of the motorists who use the crossing." 173 F.3d at 394. Ignoring the role of the states and the railroads in the Federal Grade Crossing Program, the Sixth Circuit insists that the railroad prove that an individual evaluation of the particular crossing was done by federal officials representing the Secretary of Transportation, and that as a result of that analysis, a federal official approved not merely the expenditure of funds, but also the selection and installation of the particular device at the particular crossing. To the contrary, petitioner's reading of *Easterwood*—that the participation of federal funds in the installation of a crossing warning device triggers preemption—is not only a correct and complete statement of the law, it is fully consistent with sound

[8] FHWA approval is preconditioned upon FHWA's concurrence that the warning signs or signals are adequate and will permit safe and efficient use of the roadway. 23 U.S.C. §§ 109(d) & (e); 23 C.F.R. § 630.114(b)(1988); 23 C.F.R. § 646.214(b)(4) (1988). *See infra* Part II.C.

[9] *See Armijo supra*, 87 F.3d at 1190.

[10] Tellingly, the *Shots* court premised its holding on the notion that this Court did not really mean what it said in *Easterwood*. ("[W]e do not think the literal reading [of the Supreme Court's opinion in *Easterwood*] is the correct one." 38 F.3d at 307.)

public policy; moreover, it does not leave the public unprotected as the court below seems to suggest.

II. THE CROSSING IN THIS CASE WAS UPGRADED WITH FEDERAL FUNDS IN EXACTLY THE WAY REQUIRED BY THE FEDERAL GRADE CROSSING PROGRAM

Not only does the Sixth Circuit's result-oriented decision reflect a misunderstanding of the impact of the express preemption provision contained in 49 U.S.C. § 20106, it similarly fails to grasp the comprehensive nature of the Federal Grade Crossing Program, which provides the means of determining what safety improvements are needed at rail-highway grade crossings.[11] This Program, which has resulted in billions of dollars being spent on crossing improvements, thereby avoiding thousands of deaths and injuries, is the well conceived cornerstone of a nationally uniform system established to improve crossing safety after thorough and careful consideration by Congress and the Secretary of Transportation. To appreciate why the *Easterwood* test for federal preemption, read for its plain, literal meaning, is sound as both a matter of law and public policy, it is essential to understand the Program, why and how it came about, how it works, and the role it assigns to the state and federal governments, and the railroads.

[11] Evidence of the Sixth Circuit's misunderstanding of the Grade Crossing Program is its approval of the Seventh Circuit's approach in *Shots* as "limit[ing] federal preemption in grade crossing cases to only those instances where federal regulatory authority has been exercised." 173 F.3d at 394. In fact, federal regulatory authority has been exercised in this case, and in any situation where the expenditure of federal funds is authorized for crossing upgrades. *See infra* Part II.C. In reality, the Court is looking behind the exercise of federal authority to determine whether it was done properly or wisely, something which even *Shots* rejects. 38 F.3d at 308.

A. Historical Background Leading to the Establishment of the Federal Grade Crossing Program

The Federal Grade Crossing Program is the culmination of the evolution of public officials' attempts to deal with the problem of accidents between trains and members of the public (usually operating motor vehicles) where railroad tracks and public roadways intersect. The middle decades of the nineteenth century saw the rail industry grow and expand from a nascent industry centered on the eastern seaboard to a dominant industry with operations throughout all the states and territories of the United States. This era did not present the problem of grade crossing accidents as acutely as has the modern era of railroads, for the simple reason that roads and highways were scarce in many areas of the Nation at that time. The advent and proliferation of motor vehicles, of course, was a phenomenon that lay in the future.

During the first century of railroading, regulation of grade crossings was generally a subject of state law. Although the rights and obligations of railroads and highway users were considered to be "mutual and reciprocal," [12] as roadways and tracks began to intersect, states often assigned the primary financial responsibility for the protection of the public at crossings to the railroads. Typically this was accomplished with approval of the courts. *See e.g., Erie R.R. v. Bd. of Pub. Utility Com'rs.*, 254 U.S. 394 (1921).

By the early years of the new century, the confluence of a mature railroad industry and an emerging automobile industry began to present public policy makers with new challenges. The twentieth century saw burgeoning motor vehicle traffic, followed, naturally, by the expansion of the nation's highway system. The proliferation of motor

[12] *See Continental Improvement Co. v. Stead*, 95 U.S. 161, 165 (1877).

vehicles increased dramatically the public's interaction with railroads at grade crossings and resulted in a significant increase in crossing accidents. The new environment confronting public policy makers led to a shift in thinking with respect to the grade crossing problem. One hundred years after the birth of the railroad industry in this Nation, this Court observed that, as a result of railroad supported crossing improvements during that period, a shifting of benefits had occurred from the railroads to highway users and the public. The Court concluded that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents" and that "[i]t is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 422-23 (1935).

Walters raised, for the first time, the rationale that responsibility for bearing the financial burden for crossing safety should be allocated in accordance with the benefits derived, a concept that was codified in § 5(b) of the Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 839 (now codified at 23 U.S.C. 130(b)) ("The Secretary . . . may set for each [project for the elimination of hazards of highway-rail grade crossings] a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction.) Though states continued to look to railroads to provide funding for crossing improvements, where federal funds were used for the elimination of hazards at a grade crossing, the portion of a project allocable to the railroad was limited to ten percent. *Id.*[13] Moreover, the overall outlook of public policy makers continued to shift.

[13] The Secretary of Transportation subsequently has found that grade crossing improvement projects are of "no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.R.F. § 646.210(b)(1).

The Interstate Commerce Commission (ICC), which, until the creation of the Department of Transportation in 1966, had jurisdiction over railroad safety, concluded that grade crossing safety had become a public concern which should be addressed through public initiative and funding.[14]

Within a decade of the ICC report, and in the face of steady and unabated casualties at crossings, Congress took decisive action. In 1970, comprehensive rail safety legislation was enacted under FRSA, codified at 45 U.S.C. § 421 *et seq.* (1988), with Congress specifically directing that "laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. § 434 (1988).[15] While Congress provided the Secretary of Transportation with authority to enact regulations in all areas of rail safety, 45 U.S.C. § 431(a) (1988), special attention was focused on grade crossing safety. FRSA mandated the Secretary to submit to Congress within a year, "a comprehensive study of the problem of eliminating and protecting grade crossings" to include "recommendations for appropriate action." 45 U.S.C. § 433(a) (1988). The Secretary also was required to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem" using regulatory authority over both rail and highway safety. 45 U.S.C. § 433(b) (1988). Unmistakably, Congress was keenly aware of the urgency of attacking this problem.

> The Committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. The need to do something about these terrible accidents . . . necessitates an immediate attack on the grade crossing problem as soon as possible.

H.R. Report No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4116.

Responding to the congressional mandate, the Secretary of Transportation submitted a two-part report to Congress, which crystallized the emerging consensus among public policy makers.[16] The Secretary concluded that rather than simply being a railroad problem, "the grade crossing safety problems today . . . is part of a national traffic safety problem." Report to Congress: Part I, at A30. Consequently, "the original concept that railroads have the primary or sole responsibility, financial or otherwise, for the elimination or protection of grade crossings has gradually changed, particularly in situations where Federal participation or Federal funds are involved." *Id.* In 1970, for the most part, only crossings located on the Federal-aid highway system were eligible

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[14] The ICC stated that

> In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train, which creates the hazard. . . . [H]ighway users are the principle recipients of the benefits following from rail-highway grade crossing separations and from special protection at rail-highway grade crossings. For this reason the cost of installing and maintaining such separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices.

Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, ICC Report No. 33440, 322 ICC 1, 82, 87 (1964).

[15] FRSA has since been recodified at 49 U.S.C. 20101 *et seq.* Section 434 has been recodified at 49 U.S.C. § 20106.

[16] *See* U.S. Dept. of Transp. Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem (1971) [hereinafter "Report to Congress: Part I"]: U.S. Dept. of Transp. Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving the Problem (1972) [hereinafter "Report to Congress: Part II"].

for improvements using federal funds, which had been available since 1916. *Id.* at 37.[17]

The Secretary found that responsibility over rail-highway intersections is typically divided among state agencies and the railroads, commenting that grade crossings are "the only location along the highways where the highway authorities do not have total responsibility for and control over the installation, operation and maintenance of traffic control devices." Report to Congress: Part II, at 33. The Secretary concluded that

> the net effect of the current division of responsibility and authority among the private and public interests involved at the State and local level results in a fragmented approach to grade crossing safety. . . . *The need for national coordination of an issue that affects the nation's railroad and highway systems is apparent.*

Id. at 34 (emphasis supplied).

B. The Federal Grade Crossing Program Was Established By Congress to Require a Uniform, Effective and Rational Approach to the Problem of Crossing Accidents

Congress promptly responded to the Secretary's Report, creating the Federal Grade Crossing Program as part of the Federal-Aid Highway Act of 1973. This Program, for the first time, established a national, uniform and consistent method for determining the need for, and providing for the installation of, warning devices at railroad grade crossings. The Program was established through the existing statutory framework of federal oversight and

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[17] When the Secretary's Report was authored there were about 223,000 public grade crossings, which the Report noted, varied greatly in terms of quantity of both rail and highway traffic and other pertinent characteristics. Report to Congress: Part II pp. 8-9 (Table 2). About 48,900 crossings were on the Federal-aid highway system. *Id.* at 6.

funding of highway improvement projects,[18] with specific roles for each of the involved entities, including the railroad. In 1976, Congress created a specific program authorizing funds for roads off the Federal-aid system. Pub. L. No. 94-280, 90 Stat. 452.

1. *Under the Federal Program states must survey and prioritize their crossings for improvements*

The heart of the Federal Program is 23 U.S.C. 130(d), which requires each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." Part 924 of 23 C.F.R. elaborates, requiring each state to have a highway safety program that includes a planning, implementation and evaluation component. States must have a process for collecting and maintaining a record of accident, traffic and highway data, including, for grade crossings, the characteristics of both highway and train traffic. § 924.9(a)(1). There must be a process for identifying locations determined to be hazardous on the basis of accident experience and potential. § 924.9(a)(2). Importantly, there must be a process for establishing priorities for implementing highway safety improvements. § 924.9(a)(4). To develop priorities, states must utilize a hazard index formula to determine the relative hazard at each crossing. § 924.9 (a)(4)(iii). Each state must have process for scheduling and implementing safety improvement projects in accordance with the priorities developed under § 924.9. *See* § 924.11(a).

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[18] Each state is required to have a highway safety program approved by the Secretary in accordance with uniform guidelines promulgated by the Secretary. 23 U.S.C. § 402(a).

2. *The Federal Program relies on the expertise of the state to determine the needs of their crossings and provides maximum flexibility for the states to carry out this task*

The Federal Program did not reinvent the wheel: rather, it recognized that the tools for improving crossing safety lie primarily with the states. The federal government makes available funds for crossing improvements, recognizing, however, that the state and local highway agencies possess the regulatory expertise and experience in motor and pedestrian traffic issues necessary to make sound judgments related to improving crossing safety. After all, warning devices at railroad grade crossings are traffic control devices, the sole purpose of which is to regulate and govern the flow of motor and pedestrian traffic on the roadways. These devices do not regulate train traffic.

With the carrot of federal money and the stick of federal oversight, the Program was designed to ensure that the states utilize their tools in a nationally uniform, effective, rational and efficient way. Uniformity, in the context of the Federal Program, means not that every crossing should be treated alike—clearly they should not be—but rather that the states are uniformly implementing a consistent, comprehensive approach, on a prioritized basis, to enhance safety at railroad-highway grade crossings. Each state is to report annually to the Secretary on the progress it is making to implement the Program and the effectiveness of improvements being made. 23 U.S.C. 130(g). In turn, the Secretary is to report to Congress with an analysis and evaluation of each state's program, including identification of states not in compliance. *Id.* Failure on the part of states to comply can result in loss of eligibility for federal funds.

The Federal Program does not trample on the ability of states to exercise authority to protect their citizens at grade crossings. To the contrary, federal law and regulation give the states maximum flexibility to implement the Program in accordance with their individual needs and practices.[19] As *Easterwood* recognized, where states choose to use federal money to install warning devices of any kind at crossings, federal regulations do establish certain requirements, 23 C.F.R. § 646.214(b)(3) & (4): these regulations cover the subject matter of the very state law that is at issue in this case. *See supra* Part I.A. However, even these regulations, which set the standards for adequate warning devices when federal funds are used, are written to allow for flexibility and subjective judgment. The factors listed at 23 C.F.R. § 646.214(b)(3)(i)(A)-(E), which call for installation of automatic gates and lights are, for the most part, neither precise nor specifically defined (e.g., "high" speed trains; "limited" sight distances; "moderately high" volumes of traffic; "substantial" numbers of school buses). This clearly allows for the exercise of judgment by state officials evaluating a crossing. As the Department of Transportation observed, "[t]he selection of traffic control devices at a crossing is determined by the public agency having jurisdiction. Due to the large number of significant variables to be considered, there is no single system of active control devices universally applicable to crossings." U.S.DOT, Federal Highway Administration, *Rail-Highway Crossings Study* 4-9 (1989).[20]

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[19] The Highway Administration "does not believe that the inclusion of rigid requirements for a detailed program content is necessary to maintain federal oversight and control of the overall highway safety improvement program." Highway Safety Improvement Program, Final Rule, 44 Fed. Reg. 11,543, 11,544 (Mar. 1, 1979). For example, the regulations do not dictate the hazard index formula the states must utilize, and a number of different indices are used by the states. *See* U.S. DOT, Federal Highway Administration, *Railroad-Highway Grade Crossing Handbook* 63 (2d ed. 1986).

[20] The Sixth Circuit remarked that the plaintiff attempted to introduce evidence at trial showing that some of the 646.214(b)(3)

A key aspect of the Federal Program is the requirement that in prioritizing crossing improvement projects, states must consider the accident *potential* at all the crossings within their borders, a departure from the previous state-law focus on accident history, which naturally limits its evaluation to crossings at which accidents have occurred. "The FHWA considers that reducing the potential for accidents is the most important aspect of the safety improvement program . . ." 44 Fed. Reg. at 11,544. This requires a forward looking, prospective evaluation of crossings, calling for, among other things, taking into account planned development in the area near the crossing and other conditions that might increase or decrease hazards in the future.[21] For example, FHWA suggested that state officials should develop pertinent information by "contacts with school transportation officials, route managers for motor bus companies, AMTRAK, and local officials who might be aware of special situations." 44 Fed. Reg. at 11,543. *See* 23 C.F.R. § 924.9(a)(4)(v). In making decision about crossings, states also rely in part

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conditions existed at the crossing. 173 F.3d at 388. Such evidence has no bearing on the preemption analysis. Whether or not such conditions exist at a crossing, warranting active warning devices, is a determination made by the traffic engineering officials at the time of the federally funded project, which may not be second guessed by a jury. To hold otherwise would be tantamount to a determination that when the federal government issued this regulation, it meant that it be enforced by juries sitting in state law tort suits years after the fact. *See Sharp supra*, ("[W]hether the conditions listed in (b)(3) exist at a particular crossing is for the FHWA, not a jury to decide. Once the FHWA has spoken on the issue by providing federal funds for a state improvement project, the determination of whether (b)(3) conditions exist has already been made, and it may not be revisited by the state court." 952 S.W.2d at 667.).

[21] In contrast, regulation through tort law generally is retrospective in nature: juries evaluate the facts surrounding a specific accident, determine the standard of care, largely based on past experience, and award damages based on their determination of whether a defendant adhered to such a standard.

on the USDOT/AAR Railroad-Highway Grade Crossing Inventory. *See supra* note 4.

3. The Program requires railroads to provide railroad-related information relevant to crossings to highway officials and to cooperate with crossing evaluations done by the states

Railroads, of course, have a role in the Program, albeit a role which is limited and geared toward utilizing the railroads' particular knowledge and expertise: it does not include the selection of warning devices. While railroads are not privy to much of the key information related to a crossing (e.g., motor vehicle traffic counts), they clearly are in the best position to supply some important, relevant information, such as train frequency, train speed and commodity mix (e.g., hazardous materials). Consequently, they have an obligation to provide such information, and to keep it up to date.[22] Railroads also are required to supply accident-related information to FRA (copies of which are forwarded to the states), which provides additional data to be used by the states in setting priorities and making decisions.

Railroads also may be asked to serve on a diagnostic team assembled by the state to evaluate crossings and make recommendations regarding the devices to be installed at a crossing. Once a federally funded project is approved, the railroad frequently, but not always, will be selected by the state as a contractor to install the device, subject to the federal regulations governing this procedure.

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[22] *See* U.S. DOT, *National Railroad-Highway Crossing Inventory Update Manual* (1976), under which railroads are required to update railroad-related data, and state authorities are required to update non-railroad-related data. The Grade Crossing Program is a dynamic one. Even after a crossing has been improved with federal funds, it is monitored by state officials. If changed conditions warrant, the warning devices at a crossing may be further upgraded with federal funds. *See Armijo supra* 87 F.3d at 1192.

C. When FHWA Approves Federal Funding for a Crossing Project of Necessity It Approves of the Warning Devices at Each Crossing Within the Project

The Sixth Circuit's holding is premised on a faulty view of the Grade Crossing Program, and evinces a lack of understanding of the approval process required by federal law. The Federal Program is not, nor was it ever meant to be, a program under which the federal government evaluates each and every grade crossing. Nor does it envision the federal government acting as a passive dispenser of funds. Instead, it lays out a process for the states to make evaluations and decisions, which are subject to federal approval when a state decides to use federal funds.[23]

Federal law mandates that federal funds may not be used on a planned highway safety improvement unless the project meets all federal requirements, including being adequate and sufficient from a safety standpoint. *See* 23 U.S.C. 109(d) & (e).[24] Before a state highway agency may proceed with an improvement project using federal funds it must seek written authorization from FHWA. The applicable regulatory requirement in effect at the time

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[23] States are free to decide for which crossing projects they will seek to utilize federal funds. 23 U.S.C. § 145.

[24] Although the court below glossed over this important point, the significance of this statutory proscription was not lost on the court in *Hester supra*, which reasoned that "[t]he regulations direct the Secretary to authorize the expenditure of federal funds only on the projects that satisfy, *inter alia*, the requirements of federal law, specifically 23 U.S.C. § 109. [footnote omitted] . . . The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized the expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task." [footnote omitted] 61 F.3d at 387. *See also Sharp supra*, 952 S.W.2d at 667. Even if, as the Sixth Circuit suggests, the state did not carry out the Federal Program in compliance with the law (and there is no support for this suggestion),

of the project in this case, 23 C.F.R. § 630.114(b) (1988), provided that ". . . authorization can be given only after applicable prerequisite requirements of Federal laws and implementing regulations and directives have been satisfied, i.e., A-95 clearing house review and standards as prescribed by 23 U.S.C. 109." [25] Section 109(e) requires "proper safety devices complying with the safety standards determined by the Secretary at that time as being adequate." Further, 23 C.F.R. § 646.216 contains comprehensive requirements for FHWA authorizations at all stages of the project, including approval of the project or state-railroad agreement, and approval of all plans, estimates and specifications. It is ludicrous to suggest that FHWA simply authorizes funds without any consideration as to how the funds are being spent or whether the project is in compliance with applicable regulations.[26]

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that says nothing about whether regulations covering the subject matter are applicable, and does nothing to undermine preemption.

[25] This regulation was subsequently recodified and cast in slightly different language in 1996 as 23 C.F.R. § 630.106(a). FHWA's explanation of the recodification indicates no change in substance was intended as a result of the rewording. Federal Aid-Project Authorization, Final Rule, 61 Fed. Reg. 35,629, 35,630 (July 8, 1996).

[26] At the time of the project in question, the standard Federal-Aid Project Agreement (Form PR-2, *see* J.A. 128), required to be submitted to FHWA by the state agency, begins with the state's certification that it has complied or will comply with Title 23, U.S. Code, and all federal regulations, policies and procedures. The "Agreement Provisions" also include the following requirement:

> 11. *Signing and Marking.* The State highway agency will not install or permit to be installed any signs, signals or markings not in conformance with the standards approved by the Federal Highway Administration pursuant to 23 U.S.C. 109(d) or the State's certification as applicable.

J.A. 130. 23 C.F.R. Part 630, Subpt. C, App. A (1988) Since FHWA's divisional offices maintain a continuing relationship with the state agency and are well aware of the quality of the state's inventory data, hazard indexing formula, and other aspects of the state's grade crossing plan, the state's Project Agreement assur-

D. The Federal Program Envisions That Like the Crossing in This Case There Are Numerous Crossings Where Passive Devices Are Deemed Adequate

It is perfectly reasonable, and consistent with the Federal Program, that passive warning devices, like those installed in this case, would constitute the most appropriate device for many crossings. The Grade Crossing Program contemplates that in many cases, given the characteristics of a crossing, minimal passive devices would be considered by highway officials to be adequate for a crossing.[27] The Secretary's Report to Congress recognized that given the combination of train and highway traffic volume at tens of thousands of crossings "there is but a remote possibility of finding adequate justification for other than minimum protection of the static sign type." Report to Congress: Part I at v. Congress too recognized as much. Noting that with respect to over 70,000 crossings, having less than 2 train movements and 5,000 vehicular movements daily, "[f]ew . . . have sufficient accident potential to justify train actuated protection." H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1893. In fact, projects like the one undertaken by Tennessee in this case, under which a group of low hazard crossings

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ances are more than sufficient basis for FHWA's concurrence as regards to the adequacy of the devices which the states propose for installation with federal funds. Of course, where FHWA has reservations either as to the quality of the state's program, or the project documents indicate that the state has not complied with FHWA requirements as to the adequacy of the devices, FHWA is required to deny federal funding, or require the state to amend the proposal to meet federal requirements as to the adequacy of the proposed devices.

[27] The Sixth Circuit draws a distinction between federal funding of "minimum" crossing devices and "adequate" devices, suggesting that preemption may apply only when the latter are installed. There is no basis in the law or regulations to support the notion that two forms of federal funding exists under the Grade Crossing Program: one which requires compliance with applicable regulations, and one which does not.

were upgraded with passive devices, were specifically contemplated in the Secretary's Report.[28]

Crossing improvements are to be accomplished in accordance wtih the priorities established under the state's priority ranking system. Tennessee officials would have had numerous data about the Oakwood Church Road crossing at their disposal from the Inventory,[29] as well as from the state's own data collection efforts required by § 924.9(a). No doubt, they were well aware of their obligations under federal law when using federal funds. Their judgment that this rural crossing, and the others included in the same upgrade project, warranted improvement with the passive devices that were actually installed is hardly surprising. The Secretary's authorization of funds for the project signified the federal governments was satisfied that all federal requirements were met. *See supra* note 26. There is no requirement that such a decision be reflected through a particularized "approval" with respect to each and every crossing covered by a project.

III. THE SIXTH CIRCUIT'S DECISION MISPERCEIVES THE SIGNIFICANCE OF 23 U.S.C. § 409 IN GRADE CROSSING LITIGATION

The Sixth Circuit's decision would allow state court juries to piggyback onto the Federal Program and second guess the decisions of state DOTs and FHWA whenever passive devices only have been installed. Not only is this approach totally at odds with the Grade Crossing Program, its unworkability is underscored by the operation of another federal statute, 23 U.S.C. § 409. Section 409 precludes reports, surveys, schedules, lists or data com-

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[28] The Report recommended implementation of a program for installation of passive devices "[t]o effectively treat the large number of lower volume crossings which do not warrant active protection . . ." Report to Congress: Part II at ii.

[29] The Inventory, along with accident history, is available at the FRA website at http://safetydata.fra.dot.gov/officeofsafety.

piled or collected for the purpose of identifying, evaluating, or planning safety enhancements of rail-highway crossings under the Grade Crossing Program from being discovered, admitted into evidence or used in any other way in an action for damages.

The success of the Grade Crossing Program is dependent on sound decision making by state authorities in identifying hazardous crossing, selecting adequate warning devices, and scheduling upgrades on a priority basis. Section 409 is meant to promote sound decision making by fostering complete candor in the collection and maintenance of the data needed properly to make such decisions, by eliminating the concern that the data will be used as the basis for alleging liability in subsequent litigation.[30]

In concluding that § 409 does not bar the railroad from showing that the Secretary "approved passive warning devices at the Oakwood Church Road Crossing", 173 F.3d at 397, the Sixth Circuit missed the significance of § 409.[31] Section 409 serves an important purpose in ensuring the effectiveness of the Federal Program. In doing so, as a practical matter, it puts off limits to railroads or other defendants, such as a state, if sued over its DOT's decisions (as well as plaintiffs), the best evidence to show the degree and nature of hazard posed by a particular crossing to support an argument to the jury that the warning devices at the crossing were adequate. In a law-

[30] *See Harrison v. Burlington Northern R.R.*, 965 F.2d 155 (7th Cir. 1992); *Robertson v. Union Pacific R.R.*, 954 F.2d 1433 (8th Cir. 1992).

[31] The FHWA did make such an approval when it authorized the use of federal funds for the project which included the Oakwood Church Road crossing, a fact that *was* proved by the railroad. Granted, the railroad (even if not barred by 409) did not show FHWA's specific approval of particular passive devices at a particular crossing: that kind of approval is not a requirement of the Program, nor is it intended to be.

suit like the one giving rise to this case, the railroad might never even be able to tell a jury where the crossing ranked on the state's list,[32] let alone what kind of traffic engineering judgments the state DOT officials made with regard to the crossing.[33] Instead, the key issue at such trials will turn into a battle of hired experts, testifying on the basis of their own "theories," having no relation to the hazard analysis made by the state agencies under the Federal Grade Crossing Program.

IV. THE FEDERAL GRADE CROSSING PROGRAM EFFECTIVELY PROTECTS THE PUBLIC

The use of federal funds to install warning devices at a crossing has the effect of preempting state law requiring the installation of different or additional devices. Establishing this as the sole test of preemption is not a decision to leave the public unprotected as the result of a legalistic application of the preemption doctrine.[34] The public is, and for over two and a half decades has been, protected by the Grade Crossing Program.

The public is protected by crossings being upgraded with either passive or active warning devices pursuant to

[32] *See Sawyer v. Illinois Central Gulf R.R.*, 606 So.2d 1069 (Miss. 1992); *Claspill v. Missouri Pac. R.R.*, 793 S.W.2d 139 (Mo. 1990).

[33] The Sixth Circuit suggests, though it has no way of knowing, that the crossing in this case "ha[s] not yet been analyzed in accordance with subsection (b)(3) and (4)." 173 F.3d at 395. Of course, because of § 409, the litigants have no way of determining this, much less informing the court. In fact, in *St. Louis S.W. Ry. Co. v. Malone Freight Lines*, 39 F.3d 864 (8th Cir. 1994), the court found that, even if a federally funded project for gates and flashers was ongoing, but unfinished at the time of an accident, because of § 409 "the evidence presented at trial should be the same as if no upgrades had been planned." *Id.* at 867.

[34] Of course, plaintiffs will continue to have a remedy for a railroad's violation of other state law duties that are not preempted, such as failure to sound the train's whistle or to keep a proper look out. If this Court reverses the Sixth Circuit, the case will go back for a new trial on the other allegations raised by the plaintiff.

the Program, and those crossings remain on the state's hazard index and continue to be surveyed as required by 23 U.S.C. § 130(d) for possible additional upgrades or even grade separation. Further upgrades may be necessitated as traffic count changes, train traffic increases, or other factors warrant additional devices upon evaluation by the state. This is accomplished through updating the DOT Grade Crossing Inventory, periodic state surveys, diagnostic team reviews, accident reports, and the receipt of other information deemed relevant by the state. This is an on-going review process not impacted by the initial installation of a particular kind of device at the crossing. The Sixth Circuit's belief that the *Easterwood* test for triggering federal preemption would leave "the public unprotected" demonstrates a lack of understanding and appreciation of the Federal Grade Crossing Program.

In fact, the Program has been remarkably successful in eliminating hazards at grade crossings. Since the Program began the numbers of grade crossing accidents, and related injuries and fatalities, have dropped dramatically.[35] Moreover, since the *Easterwood* decision established that state law is preempted where federal funds participate in the installation of warning devices, the numbers of injuries and fatalities have continued to decline significantly.[36] And, significantly, during that time, most courts have not followed the narrow view of the Sixth and Seventh Circuits regarding preemption. *See supra* note 6. There is certainly no evidence that petitioner's view of preemption increases the risk to the public.

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[35] *See supra* p. 2.

[36] From 1993 through 1998, the number of injuries and fatalities resulting from accidents between trains and motor vehicles at public crossings declined by 32.4% and 37.1% respectively. *See* Federal Highway Administration, *Highway-Rail Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1998*, p. 33 (1994) (Table 4); *1998 Safety Statistics*, ch. 7, p. 6 (Table 7-1).

V. UNDER THE FACTS OF THIS CASE AND WHENEVER FEDERAL FUNDS PARTICIPATE IN THE INSTALLATION OF CROSSING WARNING DEVICES CONGRESS HAS PREEMPTED STATE LAW TORT DUTIES REQUIRING THE INSTALLATION OF ADDITIONAL OR DIFFERENT DEVICES

In this case, the Grade Crossing Program was utilized as it was intended, i.e., the federal government did step in, first when it issued regulations covering the subject matter that are applicable whenever federal funds are used to improve a crossing, and subsequently when it authorized federal funds for use on a project covering the crossing at which the accident took place. There is no evidence that any required (or "desired") action was not taken on the railroad's part.[37] Nonetheless, the Sixth Circuit and respondent believe that it would be desirable to require railroads to implement their own programs parallel to the Federal Program, and to undertake their own evaluations of crossings on top of those done by the states. At the end of the day, they would have railroads install and pay for automatic gates at all crossings that do not have them, including crossings where federal money has been spent, and federal approval given, for the installation of passive devices. The hammer to enforce this requirement would be the threat of state law tort suits.

Whether superimposing state tort law on top of the Federal Program would provide a more effective means of achieving crossing safety is hardly debatable: in response to the Secretary's Report highlighting the shortcomings inherent in the then-prevailing fragmented approach under state law, Congress decided that there was a better way

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[37] The Sixth Circuit opined that the *Hester*; *Elrod*; *Armijo* approach to preemption improperly grants the railroad a prize (i.e., immunity from state tort law), without requiring that the railroad "take[] the desired action" (i.e., work with the state to improve the crossing), 173 F.3d at 395, an opinion that does not withstand scrutiny.

of dealing with grade crossing safety—and the results overwhelmingly prove the congressional wisdom.[38]

In any case, where, as here, state regulation has been displaced by virtue of the Supremacy Clause of the Constitution, art. VI, cl. 2, the effectiveness of state law is legally irrelevant. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235 (1947). (Regulated party "could not be required by the State to do more or additional things or to conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act" and "[t]he federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.") If, as respondent contends, state tort law provides a preferable way to improve crossing safety or, as the Sixth Circuit implies, the Federal Program is not working properly, those matters are for Congress to address, and if need be, remedy.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for a new trial on respondent's claims unrelated to the adequacy of the grade crossing warning devices.

Respectfully submitted,

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December 16, 1999

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[38] Given their important role in the Program, a number of states, recognizing the need for a clear test for preemption, have written to the Federal Railroad Administration in support of petitioner's position. These letters will be lodged with the Court.

Supreme Court, U.S
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In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS
NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether it is appropriate for a court to apply a presumption against preemption when the governing federal statute contains an unambiguous express preemption provision.

2. Whether the Federal Railroad Safety Act preempts state tort claims alleging the inadequacy of warning devices at railroad crossings, when the devices were installed with federal funds under a project approved by the federal government.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 major manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. PLAC's primary purpose is to file *amicus* briefs in cases involving issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus* briefs in both state and federal courts, including many in this Court.

This case, which concerns the scope of the preemption doctrine, raises issues of considerable importance to *amicus* and its members. The court of appeals took an unduly cramped approach to the doctrine and, in doing so, misconstrued existing precedent of this Court; if applied in other contexts, the court of appeals' mode of preemption analysis would lead to the proliferation of varying and often conflicting rules governing the manufacture, distribution, and use of products in different jurisdictions. Because this outcome would impose substantial burdens and expense on manufacturers, sellers, and consumers — and because it often would frustrate the intent of Congress and federal regulatory agencies — we submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' analysis went astray in several crucial respects. *First*, the court erred in applying a presumption against preemption. Because it is fundamental that preemption turns on congressional intent — and because

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by *amicus* and was written entirely by its counsel.

the Court conducts an inquiry into preemption by "'begin[ning] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'" (*FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990) (citation omitted)) -- any presumption regarding preemption must yield to the usual tools of statutory construction. In the presence of an express preemption clause, a presumption logically could come into play only when the statutory language is wholly ambiguous and the circumstances suggest that it would be inconsistent with congressional intent to displace state law. But that is not the case here: the controlling language is unambiguous, and there is no reason to believe that Congress would have wanted to preserve inconsistent state-law rules.

Second, the court of appeals misunderstood this Court's holding in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Interpreting the plain language of the controlling statute, the Court in *Easterwood* found that regulations issued by the Secretary of Transportation displace state rules that apply to railway crossings "in which federal funds participate in the installation of warning devices." *Id.* at 670. That analysis dictates the outcome of this case, in which federal funds inarguably *were* involved in construction of the warning device at issue. The court of appeals' contrary view — that preemption is appropriate only if the Secretary specifically approved the device used at a particular crossing — is insupportable: the plain language of the statute requires preemption when the Secretary's regulation "cover[s] the subject matter of the State requirement" (49 U.S.C. § 20106), and that is the case here.

Third, the court of appeals lost sight of the policies underlying the governing statute and regulations. That both the state and federal laws are in some sense directed at promoting safety is beside the point: when Congress has required uniformity, state laws are not saved simply because they are consistent with the federal goals. And the court took

no account of the practical consequences of its ruling. Under the federal statute and regulations, the Secretary ultimately is responsible both for determining the scope of a railroad's involvement in the selection of warning devices and for approving the device actually selected. As a consequence, the court of appeals imposed a regime that would hold railroads liable for decisions that were overseen and approved by federal authorities. Congress could not have intended such an unfair result.

ARGUMENT

FEDERAL LAW PREEMPTS STATE TORT CLAIMS ASSERTING THAT WARNING DEVICES AT FEDERALLY-FUNDED RAILWAY GRADE CROSSINGS ARE INADEQUATE

A. A "Presumption Against Preemption" Is Not Appropriate In This Case

1. The court of appeals began its analysis by declaring that courts must resolve cases like this one by applying a presumption against preemption. 173 F.3d at 394 ("preemption analysis must 'start with the assumption that the historic police powers of the States [were] not to be superseded by [the] Federal Act unless that [was] the clear and manifest purpose of Congress'") (quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), in turn quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (bracketed material added by the court of appeals). But the application of this presumption — which infected the entirety of the court's analysis — was unwarranted. We have argued elsewhere that a presumption against preemption may have validity only in very narrow circumstances.[2] Its use certainly cannot be justified in a case, like this one, in which

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[2] See Br. of the Product Liability Advisory Council, Inc, in *United States* v. *Locke*, Nos. 98-1701 and 98-1706.

Congress expressly defined the scope of preemption while acting in an area that historically has received federal attention.

There is considerable illogic in application of the court of appeals' presumption here. *First*, applying the presumption where there is an express preemption provision generally will conflict with the central, universally acknowledged rule governing preemption cases: "[p]re-emption fundamentally is a question of congressional intent." *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990).[3] Even decisions that have forcefully stated the presumption have gone on to recognize that the Court's

> analysis of the scope of [a] statute's pre-emption is guided by [the] oft-repeated comment, initially made in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." * * * As a result, any understanding of the scope of a pre-emptive statute must rest primarily on "a fair understanding of congressional purpose."

Medtronic, Inc. v. *Lohr*, 518 U.S. 470, 485-486 (1996) (quoting *Cipollone*, 505 U.S. at 530 n.27 (Stevens, J.)). See, *e.g.*, *New York State Conference of Blue Cross and Blue Shield Plans* v. *Travelers, Inc.*, 514 U.S. 645, 655 (1995); *Gade*, 505 U.S. at 116 (Souter, J., dissenting). Thus, the Court's "ultimate task in any pre-emption case is to determine

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[3] See, *e.g.*, *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992) (plurality opinion); *Cipollone*, 505 U.S. at 545 (opinion of Scalia, J.); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985); *Hillsborough County* v. *Automated Medical Lab., Inc.*, 471 U.S. 707, 714 (1985); *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500 (1984); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

whether state regulation is consistent with the structure and purpose of the statute as a whole" (*Gade*, 505 U.S. at 98 (plurality opinion)), an inquiry that "'begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *FMC Corp.*, 498 U.S. at 57 (1990) (citation omitted).

Against this background, it is settled that, "'[i]f the intent of Congress is clear, that is the end of the matter; for the court * * * must give effect to the unambiguously expressed intent of Congress.'" *Id.* at 57 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted)). Thus, any presumption against preemption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Cipollone*, 505 U.S. at 545 (opinion of Scalia, J.). See generally *id.* at 544 ("Under the Supremacy Clause, * * * [the Court's] job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."). Indeed, the Court in *Easterwood*, after adverting to the presumption against preemption, proceeded to declare (somewhat inconsistently) that, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's intent." 507 U.S. at 664. It therefore appears that, when Congress has enacted an express preemption clause, the presumption must yield to the ordinary tools of statutory interpretation.

Indeed, for a court to apply an interpretive presumption at the expense of concrete indicia of congressional intent would depart from the proper judicial role. As a recent commentator has noted, "the constitutional structure of federalism does not admit of a general presumption against federal preemption of state law." Viet D. Dinh, *Reassessing the Presumption Against Preemption*, ___ GEO. L.J.

(forthcoming 2000) (which has been lodged with the Clerk of the Court). The Supremacy Clause is not an affirmative grant of power to Congress; it "simply specifies the constitutional equivalent of a choice of law rule and gives trumping effect to federal law." *Id.* at 5. As such, the power to preempt state law comes not from the Supremacy Clause, but from the affirmative grants of power in Article I, section 8 of the Constitution.

> Given this constitutional structure, to the extent that there are questions of constitutional policy in preemption — questions about the relative power of Congress and of the state legislatures, "the Danger * * * that the national would swallow up the State Legislatures," and the like — those questions were answered by the framers with the specific enumerations and limitations of federal legislative power in Article I and inclusion of the Supremacy Clause in the Constitution. And to the extent that other federalism questions remain — the wisdom of national regulation, the balance between regulatory uniformity and policy innovations, etc. — those questions are, by constitutional design, to be answered by Congress and, through delegated power, by the executive branch.

But when Congress has legislated consistently with its delegated and limited powers, the question ceases to be one about the vertical distribution of powers between federal and state governments (after all, the Constitution gave Congress the power to legislate, and Congress has exercised that power). Rather, the question becomes one of the horizontal division of federal governmental functions among the three branches. Specifically, the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law — in short, the task of statutory construction. If in performing this seemingly neutral task * * * the Court systematically favors one result to the other, it either disrupts the constitutional division of

> power between federal and state governments or rewrites the laws enacted by Congress.

Id. at 6-7 (footnotes omitted).

Second, in light of the primacy of congressional intent, it is not surprising that the presumption against preemption is, more often than not, simply ignored. To be sure, there are a fair number of cases in which the Court has recited the familiar phrases acknowledging the presumption.[4] But there are numerous preemption decisions in which the Court has made no mention of the presumption at all. Justice Scalia has referred to the substantial body of cases in which the Court "said not a word about 'a presumption against * * * pre-emption, * * * that was to be applied to construction of the text [of a statutory preemption clause]." *Cipollone*, 505 U.S. at 546 (opinion of Scalia, J.).[5] In fact, there are a great many decisions involving express preemption where the Court has wholly disregarded any presumption against superseding state law.[6] This pattern of inconsistent application suggests that there is less to the presumption than first meets the eye.

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[4] See, *e.g.*, *Medtronic*, 518 U.S. at 485; *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655; *Cipollone*, 505 U.S. at 518; *English*, 496 U.S. at 79; *Hillsborough County*, 471 U.S. at 715.

[5] Justice Scalia cited *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Norfolk & W. Ry. Co.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

[6] See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990); *Louisiana Pub. Serv. Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

Third, the traditional rationale for the presumption does not support its use. The presumption often is said to rest on "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (opinion of Blackmun, J.). But this special solicitude for important state interests is in tension with other aspects of preemption doctrine, which regard the importance of the state interest at stake as wholly *irrelevant* to the analysis. Thus, it has long been settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). Indeed, even where the State has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, * * * clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade*, 505 U.S. at 108 (1992) (internal quotation marks and citations omitted). See, *e.g.*, *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984).

2. Against this background, we believe that, in the presence of a statutory preemption clause, a presumption against preemption may have validity only in limited circumstances: where the statutory language is wholly ambiguous and the statutory purpose regarding preemption completely indeterminate, *and* where the circumstances suggest that it would be inconsistent with congressional intent to supersede state law. Thus, if an ambiguous statute operates in a field where state regulation has had "historic primacy" (*Medtronic*, 518 U.S. at 485) — that is, where the federal government traditionally has not acted and the federal interest in a uniform rule is not apparent — it may make sense to presume that a Congress acting with this history in mind did not intend to displace state law. But such a

presumption should have no application in areas where Congress has often been active, where there is a federal interest in uniformity of regulation, or where federal primacy is rooted either in tradition or in constitutional values.

That is the case here. The Federal Railroad Safety Act ("FRSA") indisputably delegated to the Secretary of Transportation the authority to preempt state laws relating to railroad safety. See 49 U.S.C. § 20106 ("Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety *until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement*.") (emphasis added).[7] The Secretary exercised his authority to prescribe, among others, regulations related to the installation of warning devices at railway-highway grade crossings (see 23 C.F.R. §§ 646.214(b)(3)[8]

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[7] The FRSA initially was codified at 45 U.S.C. §§ 421-444. That Act later was repealed and its substantive provisions re-enacted as part of title 49. See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 1379.

[8] 23 C.F.R. § 646.214(b)(3)(i) provides: "*Adequate warning devices*, under § 646.214(b)(2) or any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track

and (b)(4)[9]). Those regulations preempt state law. See *Easterwood*, 507 U.S. at 670 (subsections (b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained"). Because Congress has expressly and unambiguously defined the statute's preemptive scope, there is no room for application of a presumption against preemption.

That is particularly so given the nature of the regulated field, which historically has drawn the attention of Congress. Congress has appropriated federal funds for use by the States at railway-highway crossings from the inception of the Federal Aid Highway Act, Act of July 11, 1916, ch.41, 89 Stat. 355. For more than 60 years, Congress also has prohibited the expenditure of federal funds on federal-aid

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crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable."

[9] 23 C.F.R. § 646.214(b)(4) provides: "For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA."

highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e). And Congress has long expressed doubt that disparate state efforts in this area are useful; at the time of the enactment of the FRSA, it questioned whether "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 91-1194, at 11 (1970). Cf., *e.g.*, *United Transp. Union* v. *Long Island R.R. Co.*, 455 U.S. 678, 687-688 (1982) ("Railroads have been subject to comprehensive federal regulation for nearly a century. * * * There is no comparable history of longstanding state regulation."); *R.J. Corman R.R. Co.* v. *Palmore*, 999 F.2d 149, 152 (6th Cir. 1993) (Congress has long regulated "almost all aspects of the railroad industry"). Against this background, there is no reason to presume that Congress acted with any special expectations about the value of state regulation here.

3. The court of appeals therefore erred in applying a presumption against preemption. And the court compounded its analytical error by finding that the presumption "looms even larger in the present context, where no analogous federal remedy exists." 173 F.3d at 394. That conclusion runs counter to settled law. This Court has often found preemption "even when the state action purported to authorize a remedy unavailable under the federal provision." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55 (1987). In *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 391 n.4 (1987), for example, the Court overturned a court of appeals' decision rejecting preemption "unless the federal cause of action relied upon provides the plaintiff with a remedy"; in so ruling, the Court emphasized that federal law is preemptive despite the fact that "the relief sought by the plaintiff could be obtained only" under state law. This principle has been consistently

followed. See, *e.g.*, *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 287 (1986); *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669, 684 (1983); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile* Co., 450 U.S. 311, 322-23 (1981). Indeed, there are many circumstances where the State's provision of a remedy that is withheld by federal law *confirms* the conflict between the state and federal regime. See, *e.g.*, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959).

The fundamental flaw in the court of appeals' reasoning was its inversion of the proper preemption analysis. The court focused first on the result if it were to find preemption. Concluding that the plaintiff would be without a remedy if state law were preempted, the court of appeals tipped the scales against preemption. The appropriate analysis, however, begins and ends with an inquiry into whether Congress intended to preempt state law. Absent evidence that Congress intended to preserve remedies for particular categories of plaintiffs, it should have been irrelevant that state law remedies were displaced. That is always the impact of preemption, and Congress is not required to provide an analogous remedy before it may preempt. Indeed, Congress may, and sometimes does, preempt without leaving any remedy at all for potential plaintiffs. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981) ("A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.").

B. *Easterwood* Compels Preemption In Cases Where Federal Funds Have Been Authorized For The Installation Of Warning Devices At Railroad Crossings

The court of appeals plainly regarded reliance on the presumption against preemption as an essential element of its holding. But the court also went on to add that, "[i]n addition

to being in harmony with the presumption against preemption, the narrow approach is more faithful to the Supreme Court's holding in *Easterwood*." 173 F.3d at 395. In our view, that pronouncement is insupportable. The court of appeals misconstrued both the plain language of the controlling statute and the unambiguous holding of *Easterwood*, while disregarding fundamental rules limiting the powers of federal courts.

1. In *Easterwood*, the Court addressed the proper interpretation of the statutory language that controls in this case, which provides that States may "adopt or continue in force a law, regulation, or order related to railroad safety *until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement*." 49 U.S.C. § 20106 (emphasis added). In determining the scope of this language, the Court characterized the relevant question as "whether the Secretary of Transportation has issued regulations covering the same subject matter as [state] negligence law pertaining to the maintenance of * * * grade crossings." 507 U.S. at 664. This means that preemption is required "if the federal regulations *substantially subsume* the *subject matter* of the relevant state law." *Ibid.* (emphasis added).

The Court accordingly turned to a review of the regulatory background, explaining that, for crossings "in which 'Federal-aid funds participate in the installation of the [warning] devices,' regulations specify warning devices that must be installed." 507 U.S. at 666 (citing 23 C.F.R. §§ 646.214(b)(3) and (4). Depending on the characteristics of the crossing, the regulations either dictate the particular type of device to be used or provide that "the type of warning device to be installed, whether the determination is made by a State . . . agency, and/or the railroad, is subject to approval of the FHWA.'" *Id.* at 666-667 (quoting 23 C.F.R.

§ 646.214(b)(4) (ellipses added by the Court)).[10] Looking to this regulatory structure, the Court found that the regulations

> displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. Indeed, §§ 646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings. * * * In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. *The Secretary's regulations therefore cover the subject matter of the state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.*

Id. at 670-671 (emphasis added). This means that, "when [the regulations] are applicable, state tort law is pre-empted." *Id.* at 670.

Applying that principle in *Easterwood*, the Court went on to find preemption inappropriate because the record revealed that federal funds had *not* "'participate[d] in the installation of the [warning] devices'" at issue in the case. 507 U.S. at 672 (bracketed material added by the Court). "In light of the inapplicability of §§ 646.214(b)(3) and (4)" to the crossings in *Easterwood*, the Court "conclude[d] that [the plaintiff's] grade crossing claim [was] not pre-empted." *Id.* at 673.

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[10] Congress has dealt with railroad safety through the FRSA and the Highway Safety Act (23 U.S.C. §§ 101 *et seq.*). The Secretary prescribed 23 C.F.R. § 646.214 pursuant to both of those statutes. See *Easterwood*, 507 U.S. at 663 & n.4. The regulations were promulgated by the Secretary through the Federal Highway Administration ("FHWA").

This analysis would seem to make preemption self-evident in this case, where the federal regulations *are* applicable. Here, the Tennessee Department of Transportation submitted a proposal to the FHWA for a state-wide project to upgrade safety at railroad crossings. The FHWA approved the project and authorized funding. The project included the installation of a passive warning device at the Oakwood Church Road Crossing and, consequently, federal funds participated in the installation of the warning device at issue. 173 F.3d at 388. Under *Easterwood*, the FHWA's authorization of funds accordingly triggered the preemptive effect of the relevant regulations, and that should have been the end of the court of appeals' analysis.[11]

2. The court of appeals took a different approach. It read *Easterwood* to stand for the proposition that the participation of federal funding is necessary but not sufficient to establish preemption. In addition to determining whether subsections (b)(3) or (4) are *applicable*, the Sixth Circuit believed that a court must determine that the Secretary *in fact* made a site-specific determination about the propriety of the particular device used. 173 F.3d at 393. Thus, the court of appeals concluded that, for preemption to apply in this case, the railroad had to show not only that federal funds participated in erection of the warning device, but also that the FHWA actually analyzed the device installed at the Oakwood Church Road Crossing. Because the crossing in

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[11] A substantial majority of the courts to address this issue have agreed. See, *e.g.*, *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858 (11th Cir. 1998); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995).

this case had a passive warning device,[12] § 646.214(b)(4) is the applicable provision of the regulations. Under the terms of subsection (b)(4), the warning device was subject to the "approval" of the FHWA. In the Sixth Circuit's view, the authorization of funds was insufficient to constitute "approval" within the meaning of subsection (b)(4).

This approach, however, simply disregarded both the plain terms of the statutory language and this Court's analysis in *Easterwood*. Under the statute, preemption turns on whether a federal regulation "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106. That inarguably is the case here; the Secretary's regulations address the nature of federally-aided warning devices required at railway crossings, which plainly is the subject matter of the state common law rule relied upon by respondent. *Easterwood*, meanwhile, gave the statute its plain reading, holding that preemption is required when the Secretary's regulations are "applicable." 507 U.S. at 670. And here, of course, the regulations are applicable. As the Tenth Circuit explained in similar circumstances, "the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands." *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996).

In addition, the Sixth Circuit's decision essentially rewrites the Secretary's regulations. The Secretary prescribed rules that outline the procedures by which a State may submit

[12] Passive warning devices are "traffic control devices * * * located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." 23 C.F.R. § 646.204. Active warning devices include "flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen." *Ibid.*

proposals for federal-aid projects to the FHWA, including projects at railroad crossings, and the methods by which such projects are to be approved by the FHWA. See 23 C.F.R. §§ 630.201-630.205 (outlining procedures for submitting proposals to the FHWA); 23 C.F.R. § 630.102 ("The purpose of this subpart is to prescribe policies for authorizing Federal-aid projects."). Before the FHWA may give authorization to proceed, the requirements outlined in the regulations must be satisfied.[13] Moreover, no funds for a railroad crossing project may be authorized "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any * * * railroad grade crossing * * *." 23 U.S.C. § 109(e). And the selection of a passive warning device installed at a particular crossing is "subject to the approval of FHWA." 23 C.F.R. § 646.214(b)(4).

Accordingly, under the regulatory scheme, the FHWA may not authorize or fund the installation of warning devices unless the devices meet federal guidelines. The Sixth Circuit nonetheless held that the mere authorization of funds did not suffice to demonstrate FHWA approval; instead, the court of appeals believed that there had to be additional evidence that the FHWA made *individualized* findings approving the warning device at issue. There is, however, no requirement in the regulations that the FHWA document or make specific findings relating to each warning device that it "approv[es]." The court of appeals' holding thus hinders the FHWA's administrative functions and imposes onerous burdens on the

[13] See, *e.g.*, 23 C.F.R. § 630.106(a) ("The FHWA issuance of an authorization to proceed with a Federal-aid project shall be in response to a written request from the State highway agency (SHA). Authorization can be given only after applicable prerequisite requirements of Federal laws and implementing regulations and directives have been satisfied.").

agency that appear nowhere in the regulatory language. That constitutes impermissible judicial interference with the FHWA's regulatory scheme.

Indeed, the Sixth Circuit's decision is premised on a *non sequitur*. The court of appeals assumed that the absence of evidence that each warning device was analyzed under subsections (b)(3) and (4) indicated that the regulatory requirements were disregarded. In fact, however, because the FHWA is barred from authorizing funds for warning devices unless the devices meet adequate federal standards, the decision to authorize funds *conclusively establishes* "approval of the FHWA" within the meaning of the statute.[14] See *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998) ("[A]n express finding, however, is not the only way for the Secretary to have 'approved' of the safety devices that were installed * * *. [I]n authorizing the expenditure of federal funds to install the passive devices * * * we presume that the Secretary approved of those devices."); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 387 (5th Cir. 1995) ("The fact that federal funds participated in the installation of the

[14] The federal government agrees with this reading. In *Easterwood*, the United States took the position that

> [t]he scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate. The regulation requires gate arms in certain circumstances, and requires FHWA approval of the safety devices in all other circumstances. Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices are necessary at a federally funded crossing is therefore preempted.

Br. for the United States at 24 (emphasis in original), Nos. 91-790 and 91-1206.

warning devices legally presupposes that the Secretary determined that the safety devices installed were adequate to their task.").[15]

C. The Goals Behind The FRSA Are Promoted By Preemption

The court of appeals attempted to justify its decision by proclaiming that "the narrow approach is more consistent with the FRSA's goals of promoting railroad safety, reducing railroad accidents, and reducing deaths and injuries as a result of such accidents." 173 F.3d at 395. In fact, the court of appeals' overly facile analysis conflicts with the policies of the FRSA.

1. As an initial matter, it is no answer to an express preemption provision that the application of state law is consistent with the policies of the statute mandating preemption. The FRSA, in addition to expressing a policy of promoting railroad safety, also determined that doing so in a nationally uniform way was the best method of achieving that goal. Indeed, Congress explicitly declared that laws "related to railroad safety shall be nationally uniform to the extent practicable." See 49 U.S.C. § 20106. When a litigant tries to avoid preemption in such circumstances, "it is not enough to say that the ultimate goal of both federal and state law" is identical. *International Paper Co.* v. *Ouellette*, 479 U.S.

[15] See also *Kennan* v. *Dow Chem. Co.*, 717 F. Supp. 799, 810 (M.D. Fla. 1989) ("If Congress has taken away the ability of the states to regulate * * * and assigned the regulation * * * to a federal agency, Congress has determined that such an assignment promotes the general welfare. Whether that federal regulatory agency carries out its function based on all available and necessary information is, therefore, irrelevant to a preemption inquiry."). That a particular decision of the Secretary might be subject to challenge under principles of administrative law does not bear on the question of preemption.

481, 494 (1987). As the Court has explained, state law is "pre-empted if it interferes with the *methods* by which the federal statute was designed to reach th[at] goal." *Id.* at 494 (citing *Michigan Canners & Freezers Ass'n* v. *Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984) (emphasis added)); see also *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386-87 (preemption provisions preempt consistent as well as inconsistent state regulations); *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould*, 475 U.S. 282, 286-87 (1986) (National Labor Relations Act prohibits not only inconsistent state regulation but also precludes state remedies for conduct violative of that Act).

2. Although the court of appeals did not give a terribly clear explanation of how it reached its result, it appears to have been motivated principally by the feeling that preemption somehow would give petitioner a benefit to which it is not entitled. The court described 23 C.F.R. §§ 646.214(b)(3) and (4) as "a system of incentives designed to increase safety at grade crossings" (173 F.3d at 395), asserting that in exchange for improving the safety of crossings, railroads are given immunity from state tort actions if they "work with the state to take the desired action." *Ibid.* The Sixth Circuit criticized the approach taken by the majority of courts — which recognizes that federal funding, by itself, is sufficient to trigger preemption — because it believed that those holdings allow "railroads [to] get the prize [of preemption] whether or not they have taken the desired action." *Ibid.*

In fact, however, it is the Sixth Circuit's holding that turns the statutory approach on its head, leading to a result that could not have been intended by Congress. That court would hold railroads liable for the decision whether to install a particular device at a given crossing. But as *Easterwood* explained, subsections (b)(3) and (4) of the regulations "effectively set the terms under which railroads are to participate in the improvement of crossings." 507 U.S. at

670. Subsection (b)(3) limits a railroad's involvement in the selection of warning devices to "participation in diagnostic teams which may recommend the use or nonuse of crossing gates." *Id.* at 671.[16] Likewise, under subsection (b)(4) "railroad participation in the initial determination of 'the type of warning device to be installed' at particular crossings is subject to the Secretary's approval." *Ibid.* Thus, as we note above, "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." *Ibid.*

In this instance, the State of Tennessee sought approval for a state-wide project to improve safety at railroad crossings, which included the installation of a passive warning device at the Oakwood Church Road Crossing. The FHWA approved the project and authorized funding. These decisions, and the regulatory structure, left no room for additional actions by petitioner. To nevertheless impose liability on petitioner for decisions taken by the State and the Secretary — decisions over which petitioner had no control — would convert the FRSA into a Kafkaesque regime. And needless to say, if railroads may be punished under state law for complying with federal regulations, the preemptive intent of the FRSA would be wholly undermined. It is impossible to believe that Congress intended such a result.

Furthermore, the unfairness of subjecting railroads to state-law tort actions would be exacerbated by the difficulty they would have in defending against those actions. Congress has provided that "reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying[,] evaluating or planning the safety enhancement" of railroad crossings are inadmissible as evidence in state or federal

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[16] Indeed, as petitioner explains (at Pet. 11 n.13), Tennessee excludes railroads from diagnostic teams.

courts. 23 U.S.C. § 409. That restriction would make it virtually impossible for petitioner to obtain or use information that could demonstrate the care with which the warning device was selected and installed. This further demonstrates the unfair consequences that would result if the court of appeals' decision is allowed to stand. And it confirms that Congress could not have intended litigation to proceed in this area.

3. Finally, the court of appeals wholly disregarded Congress's explicit desire to establish uniformity in the laws relating to railroad safety. The court of appeals' decision contradicts that policy by exposing railroads to multiple and possibly inconsistent obligations imposed by the laws of all of the States. Under such an approach, differing jury outcomes — both within a State and among States — are certain to arise. The regime that inevitably would follow from the court of appeals' decision would bear no resemblance to the uniform regulatory scheme Congress intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 99-312

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF TEXAS, ALABAMA, OKLAHOMA, PENNSYLVANIA, AND SOUTH CAROLINA

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QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), when it held that claims of negligence based on inadequate warning devices at a railway grade crossing are not preempted even though the warning devices at the crossing were installed with federal funds under a project approved by the federal government.

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No. 99-312

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

AMICUS CURIAE BRIEF OF TEXAS, ALABAMA, OKLAHOMA, PENNSYLVANIA, AND SOUTH CAROLINA

This case involves whether the approval of federal funding by the Federal Highway Administration (FHWA) for a project for the installation of passive warning devices at a railroad grade crossing pursuant to 23 C.F.R. §646.200, *et seq.*, preempts a state-law negligence claim regarding the adequacy of the devices. For the reasons that follow, amici believe that adequacy-based claims are preempted in those circumstances and urge the Court to reverse the Sixth Circuit's judgment to the contrary.

INTEREST OF AMICI

Amici Curiae Texas, Alabama, Oklahoma, Pennsylvania, and South Carolina have participated in the Federal Grade Crossing Program since its inception in 1973 and have many thousands of railroad grade crossings at which both active and passive warning devices have been installed with federal funding.[1] The program is a cooperative venture in which the states are primarily responsible for the evaluation of grade crossings and the determination of the protective warning devices to be installed in federally funded grade-crossing projects.

Amici do not argue that preemption of state law is necessarily desirable as a general matter; rather, presupposing the Court's *Easterwood* decision and the preemptive nature of §§646.214(b)(3) and (4), the states have a strong interest in protecting their traditional role in evaluating and regulating traffic safety needs at railroad grade crossings and in maintaining a clear and concise rule to determine when state-law tort claims are preempted by federal law.

When the program was initiated, the federal government preserved the states' traditional role in determining the safety needs at grade crossings. The Sixth Circuit's decision in this case potentially puts the states in an untenable position by pitting their judicial branches—through enforcement of state tort law—against their executive branches' determination that

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1. Texas alone has more than 18,000 grade crossings, of which more than 12,000 are public crossings. FEDERAL RAILROAD ADMINISTRATION, U.S. DEP'T OF TRANSP., RAILROAD SAFETY STATISTICS—ANNUAL REPORT 1998 (July 1999), at Table 9-2.

the safety devices installed as part of a federally funded project are adequate. Worse, the court of appeals's holding requiring independent federal determinations of the adequacy of warning devices (apart from funding approval) will upset the federal-state balance and diminish the states' traditional role in regulating and policing rail-crossing safety.

Congress's desire for national uniformity led it to make federal preemption part of the federal-state bargain. Although most discussions of the preemptive nature of §§646.214(b)(3) and (4) have focused on the preemption of claims against railroads, the states have also relied on the fact that the preemptive shield also extends to claims against the states, which are not uncommon.[2] When a state participates in the program and seeks federal funding to install proposed warning devices it has determined are adequate, it expects that tort claims covered by (b)(3) or (b)(4) will be preempted. The federal government used the carrot of federal funding to encourage the states to participate in a nationally uniform program of planning and implementing grade-crossing safety. Without preemption, there is a danger that the states' increased involvement in that process would subject them to an increased risk of liability.

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2. Some states, like Texas, have relatively few safety device adequacy claims because they have retained much of their sovereign immunity from suit. Other states, however, face the same kinds of claims asserted against the railroads. *See, e.g., Southern Pac. Transp. Co. v. Yarnell*, 890 P.2d 611 (Ariz. 1995); *Rick v. Louisiana Dep't of Transp. & Dev.*, 630 So.2d 1231 (La. 1994); *Farris v. Union Pac. R.R.*, 866 P.2d 189 (Idaho Ct. App. 1993).

Amici have an interest in retaining *Easterwood*'s clearly delineated test for determining whether device adequacy-based tort claims are preempted and in maintaining the integrity of the program to prevent second-guessing of the states' decisions (approved and funded by the federal government) regarding the devices to be installed at railroad grade crossings.

SUMMARY OF ARGUMENT

Under *Easterwood*, state-law tort claims alleging negligence based on the adequacy of warning devices at a railroad grade crossing when federal funds have participated in the installation of the devices pursuant to 23 C.F.R. §646.214 are preempted by 49 U.S.C. §20106. The Sixth Circuit misinterpreted the statutory and regulatory framework when it held that preemption will exist at a grade crossing with passive devices only if FHWA made an actual determination that the devices were needed and adequate. The only approval necessary to invoke preemption is the approval of federal funding for state projects for the installation of warning devices at railroad grade crossings that promote and facilitate safety pursuant to federal guidelines. The requirement imposed by the Sixth Circuit is unnecessary, unworkable, and unsupportable.

ARGUMENT

I. THE FHWA'S APPROVAL OF FEDERAL FUNDING FOR A PROJECT PREEMPTS ADEQUACY-BASED TORT CLAIMS.

A. Section 646.214(b) Preempts Tort Claims Whenever Federal Funds Participate in a Project.

The preemption analysis in this case begins, and ought to end, with *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), in which the Court addressed the scope of the express preemption provision contained in the Federal Rail Safety Act (FRSA), 49 U.S.C. §20101 *et seq.*:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 49 U.S.C. §20106.[3]

State-law standards or rules, including common-law tort standards, are preempted if a federal regulation covers the subject matter of the state-law duty. Although the Court in *Easterwood* determined that the general regulations describing the highway safety improvement program, *see* 23 C.F.R. pt.

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3. Section 20106 is the recodification of the original FRSA preemption provision, which was found at 45 U.S.C. §434. The repeal and recodification of §434 by the Act of July 5, 1994, Pub. L. No. 103-272, §I(e), 108 Stat. 887, was not meant to make any substantive changes to the law. Pub. L. 103-272 §6, 108 Stat. 1378.

924, and the Manual on Uniform Traffic Control Devices for Streets and Highways, *see* 23 C.F.R. §§655.601-.603, do not preempt state tort law,[4] the Court held that 23 C.F.R. §§646.214(b)(3) and (4) have preemptive effect because they "establish requirements as to the installation of particular warning devices." *Easterwood*, 507 U.S., at 670.

Those regulatory provisions specifically prescribe the safety devices required at certain crossings improved using federal funds and delegate to the states the authority to determine the appropriate safety devices at other crossings, subject to FHWA approval. Section 646.214(b)(3), for instance, requires automatic gates with flashing lights when certain conditions exist, including multiple tracks, high-speed train operation with limited visibility, heavy vehicle traffic, or when a diagnostic team recommends them. When the conditions defined in (b)(3) do not exist, (b)(4) declares that the state's determination of the appropriate type of warning device to be installed is subject to FHWA's approval. These requirements apply to every project in which federal funds "participate in the installation of the devices," 23 C.F.R. §646.214(b)(3)(i), and, when they apply, they cover the

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4. The Court initially noted that the term "covering" is relatively more restrictive than the admittedly expansive term "relate to," making FRSA preemption narrower than ERISA or Airline Deregulation Act preemption. *Easterwood*, 507 U.S., at 664 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992)). Notwithstanding, amici believe that the Court did not intend the extremely restrictive interpretation adopted by the court of appeals.

adequacy of the warning devices to be installed and, therefore, preempt state tort duties:

> "[F]or projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Easterwood*, 507 U.S., at 671.

Under *Easterwood*, Shanklin's tort claims asserting negligence in the use of inadequate warning devices are preempted because §§646.214(b)(3) and (4) control the selection of grade-crossing warnings, and the adequacy of those warning devices is governed by the federal standard. That is all §20106 requires. It is the existence of federal regulations that cover the subject matter of a state-law tort duty to use an adequate warning that creates preemption, not that the regulations were applied in a particular way in a particular instance.

B. The Sixth Circuit's Approach Is Inconsistent with the Regulatory Scheme and Upsets the Federal-State Balance.

The Sixth Circuit refused in this case to follow *Easterwood*'s clear directives. Although *Easterwood* focused on the fact that §§646.214(b)(3) and (4) assumed preemptive power when a proposed project was approved by FHWA and federal funds financed the grade-crossing improvements, *Shanklin* followed the Seventh Circuit's decision in *Shots v.*

CSX Transportation, Inc., 38 F.3d 304 (CA7 1994), to create an additional requirement—specific approval by the Secretary of the safety devices at the crossing at issue—that has no basis in the text, structure, or history of the FRSA. *Shanklin v. Norfolk S. R.R.*, 173 F.3d 386, 394 (CA6), *cert. granted*, 120 S.Ct. 370 (Oct. 18, 1999); *see id.*, at 397 ("Norfolk Southern needed to show that the FHWA approved passive warnings at the Oakwood Church Road Crossing. Norfolk Southern failed to do so, because, as we have held, federal funding alone is insufficient to make such a showing.").

Section 646.214(b)(4), which governed the crossings at issue in both *Shanklin* and *Shots*, states that "the type of warning device to be installed . . . is subject to the approval of FHWA," but that language does not require a separate approval on a crossing-by-crossing basis. *Shots* recognized, contrary to the Sixth Circuit's suggestion, that the FHWA's initial approval of a project for federal funds eligibility could satisfy the (b)(4) approval requirement. 38 F.3d, at 308 ("We do not doubt that the Secretary can approve a warning device before or after its installation or that he can make wholesale as well as retail approvals. We may assume as well that he can act through state safety officials as his delegates."). The Seventh Circuit merely held, albeit wrongly, that the specific agreement at issue did not contain an adequate approval because the agreement addressed only reflectorized cross-bucks at numerous crossings and did not specifically state that the affected crossings would be adequately safe if equipped with reflectorized cross-bucks. *Id.*[5]

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5. Although *Shots* stated that it would have been irresponsible for the Secretary to approve (for preemption purposes) the project at issue in that case, 38 F.3d, at 309, the converse is actually true. There was no evidence before the Seventh Circuit that the crossings affected by the project would not have been adequately protected by reflectorized cross-bucks. That the agreement did not also address other crossings was irrelevant. Moreover, the statutory and regulatory scheme presupposes a reiterative system in which state diagnostic teams prioritize future needs.

There is no reason why the federal government's approval of federal funding—either directly or by delegation—for a state grade-crossing improvement project should not be considered approval of the warning devices the state intends to install as part of the proposed project. The statutory and regulatory framework for submission and approval of projects for which the states request federal funding requires the FHWA to evaluate proposed projects for compliance with the federal standards, including the standards of §646.214(b). Consequently, FHWA approval of a proposed project is, in fact, approval of the devices that the state intends to install at the grade crossings included in the project and, therefore, constitutes approval of non-gate, passive devices to be installed pursuant to §646.214(b)(4).

Since the creation of the Federal Grade Crossing Program in 1973, amici have been active participants in the program. Congress requires the states to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. §130(d). Those surveys exist as the DOT/AAR National Rail-Highway Crossing

Inventory, which the states continuously update as part of their §130 obligations. As part of the surveys, the Department of Transportation required the states to develop a methodology for identifying and ranking crossings based on their relative hazard. *See, e.g.*, 23 C.F.R. §924.9(a)(3)-(4) ("The planning component of the highway safety improvement program shall incorporate . . . (3) [a] process for conducting engineering studies of hazardous locations . . . and (4) [a] process for establishing priorities for implementing highway safety improvement[] projects, considering . . . (iii) [t]he relative hazard of public railroad-highway grade crossings based on a hazard index formula."). Within that framework, Texas, for example, prioritizes improvement projects at railroad grade crossings under §130(d) on the basis of a relative priority ranking, taking into consideration several factors such as average daily traffic count, train traffic, train speeds, number of prior crashes, existing types of warning devices, and other relevant factors. Every public crossing in Texas has been surveyed and evaluated for priority index purposes.

In accordance with its priorities,[6] a state may each year develop and submit to FHWA projects for which federal aid is requested. *See* §630.106(a); §924.11(a), (c). All federally funded projects for grade-crossing improvements are subject

6. A particular crossing's position on the priority index is not static but may fluctuate over time. In any given year, a significant number of railroad crossings are not selected and continue to be maintained by the railroads. If the state decides to seek federal funding for the project, it is then placed in line for approval by FHWA.

to the standards of §646.214(b) and, therefore, must comply with the Manual on Uniform Traffic Control Devices for Streets and Highways. §646.214(b)(1). In addition, all grade crossings to be included in a project must be evaluated to determine what warning devices are appropriate. Those determinations are made by extensive computer analysis of data at every grade crossing according to its relative priority ranking. For crossings that are candidates for safety enhancements, Texas, for example, forms a diagnostic team of experts typically made up of local and statewide representatives of the Texas Department of Transportation, representatives of the city and county (as appropriate), a representative of the railroad company,[7] and, if applicable, representatives of FHWA or the Federal Railroad Administration. TEXAS DEP'T OF TRANSP., TRAFFIC OPERATIONS MANUAL: RAILROAD OPERATIONS VOLUME 6-23 (1998). When a diagnostic team inspects a grade crossing, it considers the possible elimination of the crossing, decides on appropriate safety enhancements, prepares initial project layouts, and determines which aspects of the project may be eligible for federal and state cost participation. *Id.*, at 6-24.

7. Unlike Tennessee, diagnostic teams in Texas do include a representative of the railroad. While plaintiffs have sometimes attempted to imply that there is something wrong with railroad representation on diagnostic teams, their presence and expertise is valuable and beneficial. The railroads have no financial obligation to pay for the proposed improvements, so the railroad representative has no incentive to propose a low-cost alternative. To the contrary, the fact that the railroads do not have to pay for the improvements actually suggests that they will recommend more protective alternatives to lower their future risk of liability.

When closing the crossing is not appropriate, the diagnostic team considers appropriate safety enhancements, including:

- active warning devices;
- advance warning signs and pavement markings;
- active advance warning flashers and signs (if sight distance is a factor on the crossing approach);
- preemption of nearby traffic signals (required if intersection is within 200 feet of crossing);
- improvements to roadway approaches and crossing approaches;
- installing or modifying curb and gutter sections, drainage structures, utility adjustments; and
- trimming or removing trees and vegetation.

Id., at 6-24 to 6-25. The diagnostic team will, subject to §646.214(b)(3)(ii), recommend automatic gates with flashing lights at grade crossings at which the conditions listed in §646.214(b)(3)(i) exist. For grade crossings subject to §646.214(b)(4), the diagnostic team will recommend warning devices conforming to the "specifications and design standards and guides" used by the state highway agency in its normal practice. §646.214(a)(2). In every instance, the diagnostic team's recommendations are determined by "which enhancements or combination of enhancements comprise the best solution for the safety to the traveling public at that crossing location." TRAFFIC OPERATIONS MANUAL at 6-25.

The diagnostic team prepares the initial project layouts, and the team decides the placement locations and distances of

signals, signal cabinets, signs, and other enhancements. *Id.* The diagnostic team member from the district office of the Texas Department of Transportation is responsible for converting the initial project layouts, notes, and team decisions into a final set of construction project layouts, and the title sheet is signed by the appropriate district officials, as well as appropriate city or county officials. *Id.*, at 6-26.

Generally, once the evaluative work has been completed, a state may prepare for submission and approval, pursuant to §630.201, a package of plans, specifications, and estimates, with supporting documentation.[8] The plans and specifications must "describe the location and design features" in detail.

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8. The approval process has been modified in some states, including Texas, by oversight agreements between the state highway agency and the FHWA, pursuant to the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). *See* 23 U.S.C. §106(c). Under those agreements, the state highway agency assumes FHWA's responsibilities for project approval and oversight for certain federal-aid projects as defined in the agreement. Importantly, the oversight agreements do not abrogate the applicable safety requirements. Rather, Congress has merely delegated FHWA's approval to the responsible state highway agency, *id.* ("[T]he State shall assume the responsibilities of the Secretary . . . ."), and both the state highway agency and FHWA are responsible for ensuring that all projects comply with applicable laws, regulations, and standards. The fact that a particular project is undertaken pursuant to an oversight agreement should have no effect on the Court's preemption analysis. In any event, like tens of thousands of grade-crossing projects dating back to the initiation of the program, the enhancements at issue in this case were not made under an oversight agreement.

§630.205(b). Thus, when a state submits a proposed project to FHWA for federal funding, the agency has before it all the information it needs to determine the adequacy of the warning devices that the state proposes to have installed at each grade crossing.

The statutory and regulatory scheme does much more, however, than provide an opportunity for FHWA to approve the adequacy of the proposed warning devices. It affirmatively requires that approval. The proposed project may not proceed until FHWA has approved the plans, specifications, and estimates. §646.216(e)(2)(i). And it is clear from the relevant statutes and regulations that FHWA may not approve the expenditure of federal funds or authorize a project to proceed unless the project will satisfy the appropriate safety requirements.

> "No funds shall be approved for expenditure . . . unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing . . . ." 23 U.S.C. §109(e).

Similarly, the regulations allow FHWA to authorize a project to proceed "only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied." §630.114(b) (1988) (moved to §630.106(a)). The Administrator's approval is in writing and will indicate whether the project is approved "in whole or in part and any qualifications or conditions determined

necessary." §630.112(b).[9] Thus, if FHWA is concerned that a state's proposed project may not contain appropriate safety measures, it may partially approve the project or may qualify or condition its approval to require additional safety measures.

The cooperative system between the state and federal governments works well to promote safety at railroad grade crossings. The system places the responsibility for performing the technical analysis and making crossing-specific recommendations in the hands of technical experts at the state level, and, in return, the federal government alleviates much of the financial pressure by substantially funding the projects it approves. Given that it is the states' responsibility to evaluate and determine the appropriate warning devices at grade crossings enhanced with federal funding, federal preemption of device adequacy-based claims is both equitable and justifiable. While every injury or fatality at a grade crossing is tragic, it is unfair to hold railroads liable for warning-device selection because it is the state (and ultimately FHWA)—not the railroad—that decides what warning devices are appropriate.[10] *See Bryan v. Norfolk & W.*

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9. Even a piecemeal approval of preliminary engineering work that demonstrates a federal commitment to fund safety enhancements at a grade crossing will preempt state-law tort liability for the adequacy of the warning devices at a grade crossing. *See Hatfield v. Burlington N. R.R.*, 64 F.3d 559, 562 (CA10 1995).

10. The court of appeals's suggestion that a finding of preemption would mean that "no one is responsible for the safety of the motorists who use the crossing," 173 F.3d, at 394, is pure hyperbole. At a crossing to which preemption applies, the state itself has taken that responsibility and has determined that the

R.R., 21 F.Supp.2d 1030, 1038 (E.D. Mo. 1997) ("It would be ludicrous to hold a railroad liable based on the government's decision as to what safety device was needed at a given crossing."), *aff'd*, 154 F.3d 899 (CA8 1998). Indeed, it is unclear whether the railroads would even have the authority to install more protective devices when a state has determined that a less protective device is appropriate.

The court of appeals's protest that railroads should enjoy preemption only if "they have taken the desired action," 173 F.3d, at 395, misunderstands the purpose of preemption in this context. Congress did not enact §20106 to reward railroads for their good deeds, and the Sixth Circuit's "understanding of economics" was misdirected in suggesting that §20106 preemption was part of an "incentive-based system" for encouraging the railroads to take a more active role in grade-crossing safety. *See id.* There is no indication in the applicable statutes or regulations that Congress offered preemption as a "prize" for the railroads' increased involvement in grade-crossing safety enhancements. Instead, Congress preempted state law to achieve national uniformity, and it sought to attain that goal by creating uniform federal standards and using federal funding to entice the states to

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warning devices are adequate. Moreover, depending on the circumstances, the railroad may be liable for other kinds of claims. "For example, plaintiffs in state tort actions might allege failure to sound the train's whistle, train speed faster than federal limits, failure to use the train's headlights, inadequate maintenance of the warning device, and inadequate maintenance of the crossing surface." *Lubben v. Chicago Cent. & Pac. R.R.*, 563 N.W.2d 596, 600 (Iowa 1997).

adopt and enforce those standards. Preemption of tort claims against railroads is justified not as a prize for the railroads' increased involvement in the process, but as a result of their decreased involvement and greatly diminished responsibility for the selection of adequate grade-crossing warning devices.

The Sixth Circuit's imposition of an additional condition precedent to preemption of state-law tort claims seriously misconceives the statutory and regulatory framework that governs the development and approval of grade-crossing enhancement projects. By holding that preemption would attach only if the railroad could demonstrate that FHWA had specifically approved the devices installed at a particular grade crossing, the court of appeals required proof of a process that does not exist within the statutory and regulatory scheme separate and apart from the existing project-approval process. There certainly is no provision for any separate documentation to be submitted to or issued by FHWA relating to the determination contemplated by the Sixth Circuit.[11] Nor is there any indication anywhere in the relevant statutes or regulations that Congress or the Secretary intended to create a separate approval process for safety and warning devices installed pursuant to §646.214(b)(4).

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11. Because the specific (b)(4) approval for preemption purposes required by the Sixth Circuit would be separate from the FHWA's project approval, it is unclear what the process or format for that approval would be. In practice, it could mean a flood of duplicative paperwork, because the information relevant to the (b)(4) preemption determination would be the same information submitted for funding approval.

To the contrary, the entire statutory and regulatory framework contemplates and presupposes that agency approvals will be made only in the context of approving a project for federal funding. Although the federal government has decided that national uniformity is exceptionally important in this area, the government has not directly required the states to install specific warning devices at particular grade crossings, nor does it affirmatively regulate the states' decisions regarding the warning devices installed at the thousands of grade crossings nationwide. Instead, as is so frequently the case, the federal government has sought to accomplish its policy goals using the carrot of federal funding. The statutory scheme of Title 23 and the applicable regulations do not force the states to install specific warning devices; they merely indicate that federal funding will not be approved if a state declines to pursue the federal government's policy goals.

It is precisely that aspect of the federal-aid scheme that makes the Sixth Circuit's reading of §646.214(b)(4) so unreasonable. When FHWA approves federal funding for a project submitted by a state, it is making the only approval contemplated by the applicable laws. The statutory and regulatory scheme is laced throughout with requirements related to FHWA's approval of a particular project. There are numerous conditions and qualifications on FHWA's authority to approve a proposed project, only some of which pertain to the adequacy of the proposed warning devices, but, in every case, the approval contemplated by the statutory and regulatory language is approval of federal funding for a state-proposed project, and that approval was given in this case. Despite the consistent regulatory framework, however, the

Sixth Circuit sought to engraft onto the system a separate preemption "approval" that has no support in any of the statutory or regulatory language and is entirely inconsistent with the intent of the program.

Only by fundamentally misconstruing the regulatory framework was the Sixth Circuit able to invent what it pejoratively called the "fiction of constructive approval." *Shanklin*, 173 F.3d, at 393. In truth, FHWA gave the only approval permitted by the applicable statutes and regulations, and the only creation of fiction in this case is the phantom "preemption approval" that the Sixth Circuit found to be missing, but for which there is no statutory or regulatory justification or allowance. In the face of specific requirements that the applicable safety prerequisites be satisfied before federal funding of a proposed project can be approved, the Sixth Circuit simply relegated consideration of those laws to afterthought status. *See id.*, at 395. Contrary to the Sixth Circuit's misconception, the argument is not that "the fiction of constructive approval is statutorily mandated," *id.*, but that actual approval was both statutorily mandated and given in this case. The court of appeals could not permissibly reject that approval by requiring that it appear in a form not envisioned or authorized by the applicable statutes and regulations. FHWA has never been in the business of issuing independent (b)(4) preemption approvals and, consequently, the effect of the court of appeals's decision, if upheld, will be to reject preemption for all (b)(4) grade crossings.

Easterwood's focus on the participation of federal funds, 507 U.S., at 670-71, should not, as the Sixth Circuit suggested, be read as something different from the FHWA approval required by §646.214(b)(4). They are, as

Easterwood contemplated, *id.*, at 671, simply two sides of the same coin. Participation of federal funds in a project means that the project was formally approved, and that in effect means that "the Secretary has determined the devices to be installed," *id.*, thus invoking the preemptive power of §646.214(b). *See Armijo v. Atchison, Topeka & Santa Fe R.R.*, 87 F.3d 1188, 1190 (CA10 1996) ("The Secretary of Transportation's authorization of passive warning devices was tantamount to a determination, pursuant to 23 C.F.R. §646.214(b)(4), that only passive, rather than active warning devices were sufficient, and that determination took the matter out of New Mexico's and Santa Fe's hands."); *Elrod v. Burlington N. R.R.*, 68 F.3d 241, 244 (CA8 1995) ("Federal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators."); *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 387 (CA5 1995) ("The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices being installed were adequate to their task.").

Ultimately, the court of appeals fundamentally misconceived the respective roles of the federal and state governments in the process of evaluating and improving grade-crossing safety. While the court of appeals looked for evidence that "the federal government has assumed liability by stepping in and making its own determination," 173 F.3d, at 394, or that "federal regulatory authority has been exercised," *id.*, the regulatory scheme clearly contemplates that the states, not the federal government, are responsible for

making grade-crossing safety determinations. The federal government's role, through FHWA, is only to endorse or reject the states' determinations by approving or disapproving federal funding for proposed projects. The independent federal determination of the adequacy of particular warning devices for which the Sixth Circuit searched would be both inconsistent with and duplicative of the states' traditional role of making those determinations. If the federal government is going to have to make an independent evaluation of the adequacy of the warning devices—separate and apart from its evaluation as part of the funding approval process—why force the states to go through the process in the first place?

Amici vigorously disagree with the Sixth Circuit's suggestion that the other circuits' approach works "an eradication of state sovereignty." *Id.*, at 395-96. To the contrary, it is the Sixth Circuit's approach that would seriously upset the federal-state balance that exists for §130 programs. Preemption of state-law tort claims is part of the bargain for state participation in these programs and, while it does affect the rights of a state's residents, the state's own determination of the adequacy of the grade-crossing warning devices alleviates all or most of any perceived unfairness in preemption. Preempting certain state-law tort claims permits the federal government to accomplish two seemingly inconsistent goals: (1) preserving the states' traditional role in policing and regulating traffic safety at railroad grade crossings; and (2) establishing a nationally uniform, credible, and effective system for evaluating the need for warning devices at railroad grade crossings. Through their cooperative effort, the states and the federal government have successfully reduced grade crossing accidents, injuries, and fatalities since

1973 despite tremendous increases in both vehicular and train traffic.

The court of appeals's concern for state sovereignty rings hollow given that its call for an independent federal determination of the adequacy of the warning devices chosen by the state suggests an unwarranted distrust of the state evaluation process. The Sixth Circuit's approach would work a serious infringement on the states' sovereignty by diminishing the states' role in evaluating the safety needs at grade crossings and determining the appropriate warning devices. It is one thing for FHWA to approve or disapprove the states' own safety determinations; it is another thing altogether for the federal government to oust the states from their traditional role in regulating traffic safety at grade crossings "by stepping in and making its own determination." *See Shanklin*, 173 F.3d, at 394.

The Sixth Circuit's decision in this case jeopardizes the federal-state balance that Congress and the Department of Transportation sought to achieve in §130 programs. It is inconsistent with the text and structure of the express preemption provision, and it has no justification or support in the statutory or regulatory scheme. The Court should reverse the judgment below and reinforce the clear interpretation articulated in *Easterwood*.

II. THE SHOWING REQUIRED BY THE COURT OF APPEALS IS INCONSISTENT WITH 23 U.S.C. §409.

Amici also disagree with the court of appeals's interpretation of 23 U.S.C. §409. Although the court of appeals seemingly did little more than create a narrow exception that would permit the discovery and admission of "the approval of the Secretary or his agent[] of the use of passive warning devices at a particular crossing," 173 F.3d, at 397, the result of its exception is a strange paradox. The one item the court said would be discoverable and admissible under §409 does not exist because FHWA has never been in the business of issuing independent (b)(4) preemption approvals. The court of appeals improperly relied on the unsupported assumption that a defendant could obtain and introduce a separate (b)(4) adequacy approval.

Moreover, it is clear that in the absence of a separate approval document, §409 would preclude the discovery or admission of any backup documentation supporting a claim of approval because it would necessarily constitute a record generated and compiled "for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds." Nor would a defendant be able to introduce independent evidence relating to the adequacy and need for the installation of the warning devices at issue because that would require delving into the factual basis for the necessity of the devices, the very thing prohibited by §409. *See Harrison v. Burlington N. R.R.*, 965 F.2d 155, 159-60 (CA7 1992).

Because the one document the Sixth Circuit suggested might be admissible does not exist, §409 would preclude a

defendant, whether a railroad or a state, from proving that FHWA actually determined that the devices were adequate and needed.

CONCLUSION

Amici urge the Court to reverse the judgment of the Sixth Circuit.

December 1999.

Respectfully submitted,

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In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE ANGELS ON TRACK FOUNDATION, THE COALITION FOR SAFER CROSSINGS, ACTIVE PEOPLE AGAINST RAILROAD TRAGEDIES (APART), HANDS ACROSS THE RAILS, RAILWATCH, AND THE NATIONAL ASSOCIATION OF RAILROAD SAFETY CONSULTANTS AND INVESTIGATORS, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This brief is written on behalf of the following concerned groups: The Angels On Track Foundation a nonprofit corporation. A foundation with the mission of providing financial support to communities to improve railroad crossing safety in the state of Ohio and to provide information to communities on other sources of funding that can be used to improve crossing safety. The Coalition for Safer Crossings, whose goal is to contribute to a higher level of safety at railroad grade crossings. The organization also seeks to provide information to the public on how to prevent accidents at railroad grade crossings before they happen. Active People Against Railroad Tragedies (APART) a nonprofit corporation dedicated to railroad safety whose goals include attaining active warning systems, crossing gates, lights and bells where needed at railroad crossings. Hands Across the Rails a group dedicated to safety whose motto is "Lights and Gates for Fifty States." Railwatch a nonprofit corporation dedicated to educating the public about rail safety and holding the nation's railroads accountable for their dismal safety record. Railwatch is supported by cities, counties, school districts, emergency management districts, local officials, victims of train accidents and their families, shippers and other concerned citizens throughout the United States. The National Association of Railroad Safety Consultants and Investigators a nonprofit corporation. NARSCI is an independent organization of people interested in railroad safety who actively work or consult in railroad safety matters. These groups have agreed to lend their backing to the preparation of this brief because they believe that affirming the Sixth Circuit

will lead to greater safety at railroad grade crossings and encourage the installation of lights and gates at grade crossings.[1]

SUMMARY OF THE ARGUMENT

Lights and gates is undeniably the most effective and cost efficient method of providing crossing safety to the motoring public. Congress, the FRA and the FHWA all acknowledged this fact in the formulation and enactment of the 1973 Federal Highway Safety Act. Therefore, in crafting legislation and regulations, "adequate protection" at hazardous railroad grade crossings was defined as lights and gates. Unfortunately, many of this country's crossings did not even meet the minimum requirements for appropriate signing in the early 1970's. Accordingly, some funding was also made available for "correcting deficiencies" at those crossings that did not have the minimum required signing and pavement markings. The rail industry seized upon the opportunity to use this federal funding program as a conduit to immunize railroads from lawsuits based upon their common law duties to provide reasonably safe crossings. Despite deregulation and the profitability that followed, the industry has adopted a uniform position that railroads will not independently fund the installation of lights and gates. In fact, they

[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded by *amicus*, Grant L. Davis, Esq., and Thomas C. Jones, Esq., of the Law Offices of Lantz Welch, P.C., and was written entirely by counsel representing the interested parties.

continue to ignore basic sign maintenance so as to qualify for funding of crossbuck replacements. The industry also actively promotes the dissemination of misleading information about the effectiveness of lights and gates.

It is respectfully requested that this Court identify the industry's manipulation of a federal funding program and affirm each state's right to protect its citizens through a case by case application of the time-proven common law.

ARGUMENT

I. LIGHTS AND GATES PROVIDE CROSSING PROTECTION THAT IS 90% EFFECTIVE IN PREVENTING ACCIDENTS.

The effectiveness of lights and gates in the prevention of accidents at railroad crossings has been recognized for over a half a century. One of the first, and most comprehensive, studies of the effectiveness of various warning devices at railroad crossings was conducted by W.J. Hedley, Assistant Chief Engineer of the Wabash Railroad. His study, "The Achievement of Grade Crossing Protection," was originally published in 1949.[2] Hedley's work showed lights and gates to be 96% effective.[3] In

[2] The Achievement of Grade Crossing Protection, W. J. Hedley, Assistant Chief Engineer, Wabash Railroad (1949).

[3] Railroad-Highway Grade Crossing Handbook, Second Edition, FHWA-TW-86-215, Thomas O. Willett, Director, Office of Engineering, Federal Highway Administration, September, 1986 page 104. Appendix 2.

1968, the American Association of State Highway Officials in cooperation with the Bureau of Public Roads published the National Cooperative Highway Research Program Report 50 entitled Factors Influencing Safety at Highway-Rail Grade Crossings.[4] The NCHRP Report 50, reviewed Hedley's study and numerous other studies, including the following:

1. "A Study of Railroad Grade Crossing Protection in Houston (1960);"[5]

2. "Results Accomplished by the Use of the Grade Crossing Protection Fund Established by the Illinois Legislature Beginning September 1, 1955, and Administered by the Illinois Commerce Commission (1965);"[6]

3. "Improved Railroad Crossing Protection and Coordination of Traffic Signals with Train Movements."

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[4] Factors Influencing Safety at Highway-Rail Grade Crossings, David W. Schoppert and Dan W. Hoyt, sponsored by the American Association of State Highway Officials in Cooperation with the Bureau of Public Roads (1968) (NCHRP Report 50) Appendix 1.

[5] A Study of Railroad Grade Crossing Protection in Houston, C. McEachern, Proc. Inst. Traffic Eng., pp. 168-172 (1960).

[6] Results Accomplished by the Use of the Grade Crossing Protection Fund Established by the Illinois Legislature Beginning September 1, 1955, and Administered by the Illinois Commerce Commission, R.B. Thomas, Illinois Commerce Comm. 13 pp. (1965).

4. "Accident Reduction at Crossings Protected Under Crossing Protection Fund (1965);[7]

5. "Traffic Control and Roadway Elements: Their Relationship to Highway Safety (1963);"[8] and the

6. "Effectiveness of Automatic Crossing Gates in Southern California, 1954 Through 1963 (1964)."[9]

NCHRP Report 50 noted that "the ideal protection, disregarding economy, is often said to be grade separation." However, a closer look at accident rates and economies of scale led to the conclusion that "this seems to indicate that grade separation may not be the answer, especially when automatic protection provides a 90% reduction in accidents."[10] In 1986 the Railroad-Highway Grade Crossing Handbook, 2nd Ed.,[11] published by the Federal Highway Administration acknowledged the existence of various studies concerning the effectiveness of lights and gates. Table 34, "Effectiveness of Active

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[7] Accident Reduction at Crossings Protected Under Crossing Protection Fund, California Public Utilities Comm., San Francisco (Aug. 26, 1965).

[8] Traffic Control and Roadway Elements: Their Relationship to Highway Safety, Schoppert, D.W., Automotive Safety Found., pp. 61-64 (1963).

[9] Effectiveness of Automatic Crossing Gates in Southern California, 1954-Through 1963, L.C. Young, California Public Utilities Comm., Los Angeles, 3 pp. (Oct. 1, 1964).

[10] NCHRP Report 50 page 79. Appendix 1.

[11] Railroad-Highway Grade Crossing Handbook, 2nd Ed.

Crossing Warning Devices",[12] contains the results of three of the studies regarding the effectiveness of active warning devices. The average effectiveness of lights and gates at railroad crossings based upon an average of the results of those three studies is 89%. Virtually all credible studies conducted on this issue have confirmed that lights and gates at grade crossings are 90% effective guarding devices for the prevention of accidents. In fact, Clifford Shoemaker, Director of Public Projects for the Union Pacific Railroad who is considered as an expert on the subject in the industry[13], admitted that lights and gates are 90% effective in preventing accidents at railroad crossings.[14]

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[12] pp. 104 of the Railroad-Highway Grade Crossing Handbook, 2nd Ed. Appendix 2.

[13] *In the United States District Court for the Western District of Oklahoma, Brenda Burks, et al. vs. Missouri Pacific Railroad Company et al.*, Case Number CIV-98-204-A, (hereinafter *Burks*) Deposition of Richard Reynolds, taken on October 29, 1998, page 95, line 20 through line 24. Appendix 4.

[14] *Burks*, Volume III of the Deposition of Clifford Shoemaker, taken on December 10, 1998, page 383, line 8 through page 384, line 24. Appendix 6. See also *In the Circuit Court of Jackson County, Missouri at Kansas City, Kimberly R. Alcorn vs. Union Pacific Railroad Company, et al.*, Case Number CV-97-31927,(hereinafter *Alcorn*) Videotaped Deposition of Clifford Shoemaker, taken May 11, 1999, page 11, line 18 through page 12, line 11. Appendix 5.

II. LIGHTS AND GATES PROVIDE THE MOST COST EFFECTIVE CROSSING PROTECTION AVAILABLE.

Two years after NCHRP Report 50 suggested the need for "intensive research" to be conducted on the cost effectiveness of train activated protection (lights and gates) at crossings versus grade separation, Congress adopted the Federal Highway Safety Act of 1970.[15] This legislation marked the beginning of an extensive research project by the Federal Highway Administration and the Federal Railroad Administration culminating in the preparation of two joint reports prepared for consideration by Congress. Those reports were: 1) Report to Congress. Railroad-Highway Safety, Part 1: A Comprehensive Statement of the Problem,[16] and 2) Report to Congress. Railroad-Highway Safety Part II: Recommendations for Resolving the Problem.[17] In the 1971 Report to Congress,[18] the FRA and FWHA analyzed the current problem with accidents at grade crossings. In their economic analysis of safety problems at grade crossings, the FHWA

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[15] Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 45 U.S.C. 421 *et seq.*, and the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130.

[16] U.S. Dep't of Transportation, Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem (1971 Report to Congress) PB206792, (Nov., 1971).

[17] U.S. Dep't of Transportation, Railroad-Highway Safety Part II: Recommendations for Resolving the Problem (1972) (1972 Report to Congress), PB 213 115.

[18] 1971 Report to Congress, at Section III, "THE CURRENT PROBLEM," pp. 23-36.

and the FRA made it clear that there are only three types of "warranted improvements" contained in their analysis. Those included 1) new grade separation; 2) reconstruction of existing grade separations; and 3) installation of automatic grade crossing protective devices (lights and gates).[19] In that report, Table 6[20] provides the results of the economic analysis for protective device improvements at grade crossings. That table specifically indicates that the protection improvements include "flashing lights and automatic gates." There is no reference to crossbuck reflectorization programs contained in the economic analysis of "warranted improvements" in this report. The only reference to crossbuck reflectorization programs is a reference that the railroads have a continuing duty to maintain grade crossing protection facilities. The report recognizes that "reflectorization of crossing signs has been an ongoing program for several years."[21] The 1972 Report to Congress included an Executive Summary.[22] The Executive Summary specified that the economic analysis in the report was limited to grade separation structures and flashing lights and automatic gates.[23] The Federal Highway Administration and Federal Railroad Administration unequivocally recommended crossing protection through the installation of lights and gates by stating the following:

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[19] *id.* see page 32.

[20] *id.* at page 35.

[21] *id.* see page 40.

[22] *id.* see page vi.

[23] *id.* see page vi.

> "An economic analysis was used in this study to identify various levels of improvement and to evaluate the reduction in nationwide losses at public grade crossings that would result from each. For purposes of the economic analysis, the types of improvement considered were limited to flashing lights, automatic gates, and grade separation structures.
>
> The cost benefit analysis indicates that grade crossing protection will return both greater overall benefits and much greater safety benefits for a given level of investment than will grade separation. Accordingly, any new federal initiative should concentrate on grade crossing protection, while grade separations and similar elimination-type projects should continue to be included in other highway programs."

Chapter X, "PUBLIC GRADE CROSSING IMPROVEMENT NEEDS," in the 1972 Report to Congress II,[24] contains the economic analysis of federal funding for grade crossing improvements. That economic analysis is limited to grade separation and crossing improvements that include flashing lights and automatic gates. The 1972 Report specifically indicates that it was not "possible to include in the economic analysis other possible types of improvements such as passive device improvements."[25] The entire discussion of "passive device improvements" is contained in one paragraph on page 90 of the 1972 Report. That one paragraph reads as follows:

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[24] *id.* pages 74-92.

[25] *id.* page 75.

It is not possible at this time to make a benefit-cost analysis of improved passive devices, such as pavement markings and signing at and in advance of the crossing. The inventory conducted for this study indicated that there are 11,365 crossings at which there are no signs. In addition, it is known that there are many crossings that have a crossbuck sign on only one highway approach. The inventory did not record those crossings with missing or otherwise deficient advance warning signs. As a first step in improving grade crossing safety, each railroad and each responsible public agency which does not already have one should undertake a program of passive device improvement. Such programs should also include the removal of obstacles from the crossing quadrants, i.e., those which impair visibility, to improve safety. The estimated cost to correct these deficiencies in passive signing and markings alone may be on the order of $10 million.

The analysis of "passive device improvements" such as crossbuck reflectorization programs was limited to one paragraph out of the two reports submitted to Congress in 1971 and 1972. In that one paragraph, the Federal Railroad Administration and Federal Highway Administration limited the discussion to such passive device improvement programs which are necessary to correct "deficiencies in passive signings and markings." The conclusion concerning the analysis of crossing improvement needs in Chapter X in Report II is as follows:

> Any new initiative should concentrate on grade crossing protection while grade separations and similar elimination-type projects should continue to be included in other highway programs. For a given level of investment much greater safety benefit can be obtained from a program of grade crossing protection than from a program including both protection and elimination of crossings by grade separations and the like. The ratio of benefits to costs for a given level of investment is much greater for protection than for grade separations and the initial cost of protection is much less than the initial cost of grade separations.

That conclusion went on to clarify that expenditures for other improvements such as "passive device improvement" should be undertaken by the public agencies and the railroads to make sure that all crossings meet the minimum requirements of MUTCD. After considering the reports to Congress the Highway Safety Act of 1973 was passed.

III. 23 C.F.R. § 646.214(b)(3) DEFINES "ADEQUATE CROSSING PROTECTION" AS LIGHTS AND GATES

If certain potentially hazardous conditions exist at any given crossing, the installation of lights and gates is mandated. 23 C.F.R. § 646.214(b)(3)(i) defines "adequate warning devices" as devices which include "automatic gates with flashing light signals." 23 C.F.R. § 646.214(b)(3)(ii) provides that *gates* may not be necessary if a diagnostic team justifies that "gates are not appropriate." Nothing in 23 C.F.R. § 646.214(b)(3) indicates that something less than flashing lights could ever meet the definition of "adequate warning devices." In recent years, most of the installations of active warning

devices at crossings include lights and gates.[26] The reason for the inclusion of automatic gates with an active installation is obvious. It only costs about $15,000 to add gates to an active installation that railroads are currently installing for somewhere in the neighborhood of $150,000.[27] The effectiveness of gates added to a lights-only installation is also verified in the Railroad-Highway Grade Crossing Handbook.[28] The addition of relatively low-cost gates to a flashing lights installation increases the installation's effectiveness by 67%.[29] Obviously, the expenditure of an additional $15,000 to make an active warning installation 67% more effective is clearly a wise expenditure. The cost of this increased effectiveness is 10% of the entire installation.

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[26] *Alcorn*, Videotaped Deposition of Clifford Shoemaker, taken May 11, 1999, page 19, lines 11-15, and page 20, lines 9-17. Appendix 5.

[27] *In the District Court of Caddo County, State of Oklahoma, Steve and Violet Myers, et al. v. Missouri Pacific Railroad Company et al.*, Case Number CJ-97-46, (hereinafter *Myers*) Deposition of Clifford Shoemaker taken on April 1, 1999, page 40 line 19, Appendix 8. *Burks*, Volume I of the Deposition of Clifford Shoemaker, taken on November 12, 1998, page 29 line 18, Appendix 6. Report of Harvey Levine, Ph.D. submitted in *State Of Minnesota, In The District Court Of Polk County, Ninth Judicial District, Toni Weaver, et al. v. Burlington Northern Santa Fe Corporation, et al.*, Case No. C9-99-22 (hereinafter *Weaver*). Appendix 10.

[28] See Railroad-Highway Grade Crossing Handbook, 2nd Ed., page 104, Table 34, Appendix 2.

[29] That is the average of the three studies referenced in the Railroad Grade Crossing Handbook, 2nd Ed., Appendix 2.

The railroad industry has attempted to bootleg "passive protection improvements" into the definition of "adequate warning devices" under 23 C.F.R. § 646.214(b)(3)(i) in an attempt to immunize railroads from liability under the banner of federal preemption. That position is not supported by the legislative history, interpretation of the regulation itself, nor the Federal Highway Administration's implementation of the Federal Highway Safety Act.

According to Wm. H. Wendling a former official of the Federal Highway Administration, the FHWA's crossbuck program was separate and distinct from programs to erect lights and gates. Crossbucks only provided minimum protection as mandated by law at all crossings as opposed to a determination of adequate protection at an individual crossing.[30] Judge Posner reached the same conclusion in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994). He noted that the Secretary of Transportation would have engaged in an "extraordinary act of irresponsibility" if he precluded liability by providing funds for minimum protection without determining what adequate protection was at an individual crossing.[31] Mr. Wendling's affidavit confirms that the Secretary was acting responsibly in his treatment of the crossbuck program.

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[30] William H. Wendling Affidavit submitted in *In the Circuit Court of Jackson County, Missouri, at Kansas City, Mark Griffin, et al. vs. Kansas City Southern Railway*. Case No. CV93-26148. (Wendling Affidavit) Appendix 18.

[31] *Shots* at 309.

As mentioned in the previous section, "passive device improvement" was included in the 1972 Report to Congress II only as an indication that many crossings needed programs that were designed to correct "deficiencies in passive signings and markings." 23 C.F.R. § 646.214(b)(4) allows the FHWA approval over any federal expenditures for such passive device improvements. The legislative history of the Federal Highway Safety Act of 1973 makes it clear that Congress intended to have appropriate signage at all 170,000 passive crossings. Congress had already targeted 29,000 of those 170,000 passive crossings for upgrading to "train actuated protection" as recommended in the 1971 Report to Congress.[32] The numbers referenced in the legislative history makes it clear that the massive signage programs designed for "passive device improvement" was intended to establish minimum compliance for all passive crossings and that at least 29,000 of those passive crossings were also targeted to be upgraded with lights and gates. As further confirmation of this fact, the Federal Highway Administration published the Federal Aid Highway Program Manual.[33] The manual specified that the first priority under the new Highway Safety Act of 1973 required "as a minimum" the states and railroads needed to "institute an improvement program to provide signing and pavement markings in

[32] Federal-Aid Highway Act of 1973, Legislative History p. 1892. Appendix 19.

[33] United States Department of Transportation, Federal Aid Highway Program Manual. (Attached as exhibit 1 to the Wendling Affidavit) Appendix 18.

compliance with the Manual on Uniform Traffic Control Devices at all grade crossings."[34]

The issue on whether compliance with the MUTCD can rise to the level of federal preemption has already been answered in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 669 (1993) wherein the court rejected the notion that compliance with the MUTCD somehow gave rise to federal preemption of any claims based upon the adequacy of grade crossing protection devices. "The MUTCD provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between the Federal and State Governments and between States and railroads."[35] 23 C.F.R. § 646.214(b)(4) and the Federal Highway Administration's characterization of these projects as being designed to obtain minimal compliance with the MUTCD is totally consistent with the 1972 Report to Congress. The report, the regulation and the implementation all address the need for "correcting deficiencies" in passive devices at thousands of railroad crossings. The lack of any cost-benefit analysis on those projects further supports the conclusion that such "passive devices improvements" were intended solely to bring all crossings into minimal compliance with the MUTCD.[36]

[34] *id.* at Vol. 6, Chap. 8, Sec. 2, p. 6. Appendix 18.

[35] *id.* at 669.

[36] See page 75 Report to Congress II.

IV. INSTALLATION OF LIGHTS AND GATES HAS BEEN AN AFFORDABLE OPTION AVAILABLE FOR THE FOUR LARGEST RAILROADS IN THE UNITED STATES SINCE 1980.

Harvey Levine was the prior Vice President of Economics for the Association of American Railroads. He spent eighteen years with the Association of American Railroads working on economic policy and economic analysis for the railroad industry.[37] After retiring from his work for the Association of American Railroads, Harvey Levine's interest in crossing safety led him to analyze grade crossing policies of the country's major railroads. Levine's analysis of the Union Pacific Railroad,[38] the Burlington Northern Santa Fe Railroad Company[39] and the Norfolk Southern[40] are contained at Appendix 9, 10, and 11. These railroads and the CSX are the four "mega railroads" which now account for 95% of the industry's traffic.[41] The economic decisions of these "mega railroads" reveal a clear industry-wide choice to prefer short-term profits to crossing safety. One of the purposes of the

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[37] Attachment 1 to the report of Harvey Levine, Ph.D. submitted in *Alcorn* and attached as Exhibit 5 to the Deposition of Harvey Levine, Ph.D. taken on August 17, 1999. Appendix 9.

[38] *id.*

[39] Report of Harvey Levine, Ph.D. Appendix 10.

[40] Report of Harvey Levine, Ph.D. submitted in *In the United States District Court For the Western District of Tennessee Eastern Division, Dwayne E. Mitchell v. Rickey D. Kelley, et al., Western Division, Defendants*, Case No. 93-1220 T (hereinafter *Mitchell*). Appendix 11.

[41] Harvey Levine, Ph.D., The Other Side of Staggers, Traffic World, Vol. 260, No. 9, page 35 (Nov. 29, 1999). Appendix 12.

Staggers Act,[42] which deregulated the industry, was to increase the profitability of the railroads so that they could better maintain and improve their infrastructure, which, in turn, would increase public safety.[43] However, the "mega railroads" Harvey Levine reviewed were already very profitable prior to deregulation and then became even more profitable following deregulation. Despite the enormous profits generated by deregulation, these railroads refused to independently fund crossing safety improvement programs. The railroads' unified position contravened one of Congress's fundamental motivations for passing legislation to deregulate the industry.[44] The American public, who was to benefit from Staggers, has not seen additional expenditures of railroad income on crossing safety.

Conclusions similar to Levine's can be drawn from a review of *CSX Transportation, Inc. v. Palank*, 743 So. 2d 556 (Fla. App. 1999). In that case, the Florida Court of Appeals upheld a punitive damage award of $50,000,000 based upon the conscious decisions of CSX to divert over two billion dollars ($2,000,000,000) from safety and maintenance expenditures to maximize corporate profit and extend the railroad's market share.[45] Harvey Levine's analysis of the other three "mega railroads" reveals the

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[42] Staggers Rail Act of 1980, Public Law 96-448, 96th Congress, 49 USC 10101, October 14, 1980.

[43] Report of Harvey Levine Ph.D. on BNSF submitted in *Weaver*, page 3. Appendix 10.

[44] BNSF report Appendix 10; UP report Appendix 9; NS report Appendix 11.

[45] *Palank* at 560 and 564.

same conscious decision-making. In fact, a jury in Jackson County, Missouri recently assessed $120,000,000 in punitive damages for this same conscious disregard for crossing safety.[46] The 1971 Report to Congress contains an extensive history of legal responsibilities for financing grade crossing safety improvements at Appendix 1 of that report. A review of that Appendix clearly establishes that states and railroads both have financial responsibilities for crossing safety.[47] The concept of joint responsibilities was confirmed in *Easterwood*.[48] In 1978, the first edition of the Railroad Grade Crossing Handbook clearly provided that:

> "Financial conditions of some major railroads is such that their interest in grade crossing improvements is maintained. It may be expected that as the financial condition of an individual railroad deteriorates or improves, the company's commitment to grade crossing improvement financing will change. Therefore, no single generalized statement applies to all railroads' ability to or interest in participating in grade crossing improvements."[49]

In spite of record profits and growth, the four mega railroads that now exist in the United States have elected

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[46] *Alcorn v. Union Pacific Railroad Co.*, In the Circuit Court of Jackson County, Missouri at Kansas City, Case No. CV 97-31927, Div. 10.

[47] See Appendix 1 of the 1971 Report to Congress.

[48] *Easterwood* at 669.

[49] Railroad-Highway Grade Crossing Handbook, FHWA-TS-78-214, Dr. R. M. Olson, Federal Highway Administration, August 1978 p.67. Appendix 3.

to not spend any of their funds on independent programs for grade crossing safety improvements.

V. THE RAILROAD INDUSTRY MADE A KNOWING AND INTELLIGENT DECISION TO OPT FOR SHORT-TERM PROFITS BY IGNORING ALL STATE COMMON LAW DUTIES TO UPGRADE RAILROAD CROSSINGS.

In 1989, the National Association of Railroad Trial Counsel Executive Committee formed a "Special Advisory Committee on Grade Crossing Litigation."[50] The purpose of that committee was to establish a preemption defense to *all* claims that railroads have a duty to provide any additional grade crossing warning devices. The work of this committee was financed by the financial backing of the Burlington Northern Railroad; the Santa Fe Railroad Company, Norfolk Southern Railroad, the Union Pacific Railroad Company, the Southern Pacific Railroad and the CSX.[51] The committee prepared a model brief that was intended to "overturn the longstanding law in many states that allocate the duty and responsibility for

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[50] Memo of Stephen Trimble addressed to all NARTC members dated March 26, 1990 attached as an exhibit to Plaintiffs' response to Defendants' Motion for Summary Judgment in *Weaver*. Appendix 13.

[51] See Letter to Stephen Trimble, dated April 17, 1990. Mr. Trimble was the Chairman of the Special Advisory Committee on Grade Crossing Litigation. The letter was also sent to Henry Moffett, Head of the National Association of Railroad Trial Counsel (NARTC). Appendix 14. See Affidavit of Merrick C. Walton in *In the District Court of Labette County, Kansas, Miika M. Monohon, et al., vs. Union Pacific Railroad Co.*, Case No. 98-C-27-OS. Appendix 15.

grade crossing safety to the railroads."[52] Shortly after the dissemination of the model brief, it became obvious that members of the National Association of Railroad Trial Counsel began shopping for "good facts and good judges who are receptive to preemption arguments."[53]

The Union Pacific Railroad has a specific policy which emphasizes that the Union Pacific Railroad will not independently fund grade crossing improvement programs which upgrade crossings to include lights and gates.[54] The Burlington Northern Santa Fe Railroad Company has had a similar policy in effect for years.[55]

The refusal of major railroads to finance crossing improvement projects is not unique to the Union Pacific Railroad nor the Burlington Northern Santa Fe Railroad Company. In fact, all four of the largest railroads in the United States participate in the Operation Lifesaver, Inc. program. That program holds itself out as an independent public information program dedicated to reducing

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[52] Memo of Stephen Trimble addressed to all NARTC members dated March 26, 1990. Appendix 13.

[53] Letter to Stephen Trimble dated April 17, 1990. Appendix 14.

[54] See Union Pacific Railroad Grade Crossing Resource Manual Chapter 6, Section C page V-C-1 and V-C-2, exhibit 4 of Richard Reynolds deposition in *Burks*, Deposition of Richard Reynolds, taken on October 29, 1998, page 137, line 23-25, page 138, line 1-24, page 141, lines 17-25, page 142, lines 1-17, page 143, lines 23-25, page 144, lines 1-7, page 147, lines 19-23. Appendix 4.

[55] See Affidavit of Robert A. Schuetze, Esquire attached as an exhibit to Plaintiffs' response to Defendants' Motion for Summary Judgment in *Weaver*. Appendix 21.

crossing accidents. However, Operation Lifesaver, Inc. is governed by an eleven-member Board of Directors[56] who are "financially, legally and ethically responsible for all activities of the corporation."[57] That eleven-member board is comprised of personnel associated with the rail industry with the exception of one member.[58] Operation Lifesaver's Position Statement reads as follows:

> To enhance highway-rail grade crossing safety, Operation Lifesaver, Inc. endorses the concept of reducing the number of crossings through consolidation, elimination, grade separation and restricting the number of new crossings.

Conspicuously missing from the Position Statement of Operation Lifesaver, Inc. is the support for the installation of lights and gates at grade crossings. The most cost-effective means of crossing protection endorsed by the FRA and FHWA is not endorsed by the industry's "public education program." In fact, Operation Lifesaver, Inc. teaches its presenters to **NEVER** refer to a crossing as "protected" or "unprotected" or "guarded" or "unguarded" because "this implies that crossings with gates, lights and bells somehow protects the motorist when in fact they are merely warning devices that are too

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[56] See Operation Lifesaver, Inc., Hand-out Section 3 attached as an exhibit to Plaintiffs' response to Defendants' Motion for Summary Judgment in *Weaver*. Appendix 16.

[57] *id.* Appendix 8 and 16.

[58] *Myers*, Deposition of Clifford Shoemaker taken on April 1, 1999, pages 59-61. Appendix 8.

often disregarded."[59] The program stresses that Operation Lifesaver, Inc. presenters are not spokespersons for Operation Lifesaver, Inc. and that they should avoid specific questions about rail policy and technology. However, when they are asked, "why aren't there gates and lights at every crossing," the following response is suggested:

> Most people think that gates and lights are the answer to preventing tragedies at grade crossings. Unfortunately, these active warning devices often are not enough because drivers sometimes choose to disregard them; in fact, over half of all grade crossing crashes at public crossings occur where active warning devices (gates, lights, bells) exist.

This scripted response is clearly misleading because it answers a specific question about *lights and gates* with statistics that include all active warning devices including antiquated systems that are in excess of fifty years old. In reality, Clifford Shoemaker, one of the board members of Operation Lifesaver, Inc.,[60] admits that only about 20% of all accidents occur at crossings with lights and gates despite the fact that 85% of the traffic encounters between cars and trains occur at those crossings.[61] Operation

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[59] See Operation Lifesaver, Inc., Hand-out Section 3. Appendix 16.

[60] *Myers*, Deposition of Clifford Shoemaker taken on April 1, 1999, page 59. Appendix 8.

[61] *Myers*, Deposition of Clifford Shoemaker taken on April 1, 1999, page 146 and *In The District Court Of Canadian County, State Of Oklahoma, Brenda and Eugene Spence, et al. vs. Missouri Pacific Railroad Company et al.*, Case No. No. CJ-97-1-01 (hereinafter *Spence*) Deposition of Clifford Shoemaker taken on October 21, 1999, page 159. Appendix 8 and 7.

Lifesaver, Inc. presenters are specifically advised to teli the public that "flashing red lights and gates don't eliminate collisions, either."[62] This industry "public education" program is misleading at best, if not a totally fraudulent misrepresentation of the facts.

The "public education" program of Operation Lifesaver, Inc. adopts the industry's position that it is entirely the government's responsibility to place lights and gates at grade crossings.[63] That position mirrors the position of the National Association of Railroad Trial Counsel, but totally ignores the holding in *Easterwood*, which rejected this blanket preemption argument.

VI. RAILROADS SHOULD NOT BE GIVEN THE POWER TO CREATE THEIR OWN PREEMPTION DEFENSE BY MANIPULATING THE FEDERAL FUNDING PROGRAM.

It has been noted that the installation of lights and gates by major railroads (Class 1 railroads) using limited federal funds are characterized by unreasonable delays and excessively high costs.[64] It has also been suggested

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[62] Operation Lifesaver, Inc. Presenters' Manual, Section 3. Appendix 16.

[63] Operation Lifesaver, Inc., Hand-out Section 3. Appendix 16.

[64] Gregory A. Malkasian, *Regulatory Issues – Crossing Safety in Oregon*, Published in Proceedings of the International Symposium on Railroad-Highway Grade Crossing Research and Safety 1990 in Knoxville, Tennessee. Appendix 17. See also *St. Louis Southwestern R.R., Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994) (referencing a fifteen month delay in the erection of lights and gates).

that federal funds which could be used for the installation of lights and gates are too frequently diverted to other projects which have the net result of lessening the number of lights and gates which can be installed under the federal funding program.[65] The Union Pacific Railroad admittedly uses federal funding to supplement its maintenance budget by applying for funding of crossbuck replacements, lens replacement programs and crossing surface improvement programs.[66] These expenditures would otherwise be ordinary expenses that should come out of the railroad maintenance budget.[67] The Union Pacific Railroad is not alone in this methodology of utilizing federal funds to supplement their own maintenance budget. The Burlington Northern Santa Fe Railroad Company openly admits that they do not do anything to inspect crossbucks to determine when they have exceeded their useful life.[68] They do not even attempt to maintain the reflective qualities on their crossbucks. In fact, the Burlington Northern Santa Fe Railroad Company waits for the state to determine that the crossbucks have fallen into such a state of disrepair that they no longer

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[65] id. at 63. Appendix 17.

[66] *Burks*, Volume II of the Deposition of Clifford Shoemaker, taken on December 9, 1998, pages 314-319. Appendix 6.

[67] *id.* Appendix 6.

[68] *In The District Court Of Pierce County, North Dakota, Gene Graumann, et al., vs. Burlington Northern Santa Fe Corporation, et al.*, Case No. 98-C-2020, Deposition of Spencer Arndt taken on July 15, 1999 page 81, lines 12-21, page 86 lines 5-15, pages 93-95, and pages 107-108. Appendix 20.

comply with the MUTCD as "reflectorized."[69] By waiting for an entire rail corridor to become a legally deficient safety hazard, the railroad qualifies for federal funding to replace all crossbucks in that corridor.[70]

Despite record profits recognized from operating revenues, the major railroads still refuse to participate in research and development costs as recommended in the 1972 Report to Congress.[71] They refuse to use competitive bidding to bring down the costs of installing lights and gates and further refuse to supplement the federal spending programs with any of their own profits. By diverting funds that could otherwise be used for lights and gates, the railroads are also effectively diluting the overall effectiveness of the federal lights and gates program. Current practices allow the major railroads to divert funds from lights and gates installations, use their own forces to install lights and gates at unreasonably high prices, create excessive delays in installation so that funds are subject to being more readily diverted and refuse to supplement the federal program with any of their own funds. These industry practices have impeded the installation of lights and gates. At the current rate, it will take in excess of One Hundred Years to provide lights and gates at all crossings in Tennessee.[72] Impeding the installation of the most cost-

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[69] *id.* Appendix 20.

[70] *id.* Appendix 20.

[71] See page 68 Report to Congress II. *Burks*, Volume II of the Deposition of Clifford Shoemaker, taken on December 9, 1998, pages 201-203, and 219. Appendix 6.

[72] Report of Harvey Levine, Ph.D. in *Mitchell*. Appendix 11.

effective form of crossing protection has never been one of the goals of Congress or the FHWA.

Manipulation of the federal funding program is simple. Any railroad can ignore sign maintenance until passive signs exceed their useful life and become noncompliant with the Manual on Uniform Traffic Control Devices. The reward for this intentional neglect of sign maintenance is the receipt of federal funding to supplement your maintenance budget. The added bonus for such conduct is the potential for gaining immunity from being sued for your intentional decision to ignore your common law duty to upgrade crossings.

Now that virtually every crossing in the United States has obtained some type of passive warning sign funded with federal money intended to "correct deficiencies" at crossings, the railroads have almost completed their plan to gain blanket immunity for their election to ignore common law duties. The last step remaining is for the United States Supreme Court to accept the industry's argument that all state law claims of inadequate warning devices at all railroad crossings are preempted by the use of federal funds used to make those crossings meet minimum compliance standards of the MUTCD. This brief is offered in support of those safety organizations and victims' groups who respectfully request this Court to thwart the industry's plan to obtain blanket immunity.

CONCLUSION

On behalf of the crossing safety organizations and victims groups joining in this brief, it is requested that the United States District Court for the 6th Circuit Court of Appeals Decision be affirmed. Affirming the Court of Appeals would do the following:

1. add confirmation that adequate crossing protection for hazardous crossings is lights and gates;
2. remove some incentive for manipulating the federal funding process in hopes of obtaining preemption of state law claims;
3. reaffirm the *Easterwood* opinion that minimum compliance with MUTCD does not preempt state law claims for improved crossing safety; and
4. allow states to protect their citizens when something less than "adequate crossing protection" exists at a hazardous crossing.

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APPENDIX 1

* * *

a result of the crossing should be considered in establishing warrants for the various types of protection. Accidents reported by the railroads to the public utility commission may not provide the entire picture of crossing effectiveness to the highway user.

Johnson (29) presents a method for determining the maximum safe speed at railroad grade crossings dependent on the visibility at the crossing and the speed of the trains. Sight triangles, speed, and distance formulas are utilized. Three assumptions were made, as follows:

1. The safe speed of a vehicle depends on the visibility and speed of the train, along with general assumptions for reaction, acceleration, and deceleration.

2. When a vehicle is a specified distance from a grade crossing, and a train is sighted, there is a speed range that is too fast for a driver to stop and too slow for a driver to beat the train to the crossing.

3. There is a critical speed at which it is safe under all conditions assuming a perception-reaction time, vehicle deceleration rate, and a vehicle acceleration rate.

It was stated that three possible things can happen when a train and a vehicle approach a crossing. The vehicle may stop, accelerate, or collide with the train. The solution to the advisory speed included:

1. Vehicle length.
2. Distance from the driver's eye to the front bumper.
3. Perception-reaction time.
4. Deceleration (15 ft/sec^2 for a truck).
5. 20 ft of clearance allowed if stopping.
6. 50 ft of clearance allowed if accelerating.
7. Constant train speed.

One of the most interesting factors brought out in an analysis by the California Public Utilities Commission (*3*) is that 70 percent of the fatal accidents involved a highway vehicle approaching the train from the fireman's side of the locomotive. It was suggested that this might be due to the driver sitting on the left side of the vehicle and not having equal vision to the right.

The ideal protection, disregarding economy, is often said to be grade separation. A report by Kaiser (*31*) states that in Ohio twice as many deaths resulted from accidents at bridges as from accidents at railroad crossings. He further stated that 1 in 21 accidents at grade crossings were fatal, whereas 1 in 24 at structures were fatal. The incidence of fatal accidents in subways was 1 in 13. This seems to indicate that grade separation may not be the answer, especially when automatic protection provides a 90 percent reduction in accidents.

The absence of supporting data in previous research and the existence of arbitrary warrants are evidence of the need for cooperative data collection and analysis. It appears that because of arbitrary warrants and the strong public opinion, due to spectacular accidents, the return realized for money spent on protection devices may not be equivalent to the benefit received from them.

The need for conservation of the national resources and expenditure of funds where they will provide the greatest rate of return dictates that intensive research be conducted in this area.

TABLE A-8

DECREASES ACCOMPLISHED BY AUTOMATIC GATE INSTALLATIONS

STUDY DATE	PERIOD	DECREASE (%)		
		TRAIN-VEHICLE ACCIDENTS	DEATHS	INJURIES
Dec. 18, 1961	1951-60	62	85	83
Apr. 1, 1963	1951-62	60	90	84
Oct. 1, 1964	1954-63	57	89	88

TABLE A-9

SUMMARY OF EFFECTIVENESS OF AUTOMATIC GATES AT GRADE CROSSINGS, BY TYPE OF PROTECTION PRIOR TO GATE INSTALLATION (75)

PRIOR PROTECTION	ACCIDENTS PER CROSSING YEAR	
	BEFORE[a]	AFTER[a]
Crossbucks	0.427	0.122
Watchman	1.789	0.265
Wigwag	0.589	0.268
Flashing light signals	0.531	0.300
Manual gates	0.693	0.188

[a] Before and after installation of automatic gates.

TABLE A-10

EFFECTIVENESS OF AUTOMATIC GATES AT GRADE CROSSINGS, BY TYPE OF PROTECTION PRIOR TO GATE INSTALLATION (*13*)

PRIOR PROTECTION	ACCIDENTS PER CROSSING YEAR	
	BEFORE	AFTER
Crossbucks	0.267	0.160
Watchman	1.021	0.155
Wigwag	0.649	0.111
Flashing light signals	0.658	0.151
Manual gates	0.344	0.039

TABLE A-11

RESULTS OF STOP-SIGN OBSERVANCE AT RAILROAD CROSSINGS AND NEARBY INTERSECTION

	VEHICLES AT INTERSECTION		VEHICLES AT RAILROADS	
	NO.	%	NO.	%
Full stop	178	31.7	257	15.4
Almost stop (0-3 mph)	312	55.6	1,021	61.2
Entered slowly (4-15 mph)	67	12.0	329	19.7
Entered fast (over 15 mph)	4	0.7	61	3.7
Total	561	100	1,668	100

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APPENDIX 2

(LOGO)

U.S. Department
of Transportation

**Federal Highway
Administration**

**RAILROAD-HIGHWAY
GRADE CROSSING
HANDBOOK**

**– SECOND EDITION
FHWA-TS-86-215
SEPTEMBER 1986**

* * *

Chapter IV Identification of Alternatives

Driving tasks differ somewhat at crossings with active devices than at crossings with passive devices only. Passive devices indicate that a crossing is present and a highway user must look for an approaching train and take appropriate action. At crossings with active devices, a motorist is told when a train is approaching. The motorist must take appropriate action when the devices are activated. Crossing traffic control devices that are train activated normally incorporate some "fail-safe" design principles. As discussed in a following section on train detection, the warning system is designed to give the indication of an approaching train whenever the system has failed.

Active traffic control devices have proven to be an effective method of improving safety and operations at railroad – highway grade crossings. Effectiveness is the percentage reduction in accidents due to a crossing improvement. Utilizing data contained in the U.S. DOT/AAR National Rail-Highway Crossing Inventory and the Railroad Accident/Incident Reporting System data bases, effectiveness factors have been developed for active devices. The effectiveness factors are shown in Table 34 along with results obtained from a California study and

from a study by William J. Hedley covering 23 years of experience on the Wabash Railroad.

The effectiveness factors presented in Table 34 were developed from "before and after" accident experience of groups of crossings actually improved. The same effectiveness would not necessarily be experienced at any other crossing where the same improvements (changes) were made. It should be remembered that in those studies the crossings were selected for improvement by competent authorities as a precondition to performance of the work. Similar effectiveness could be anticipated under similar conditions.

* * *

Table 34. Effectiveness of Active Crossing Warning Devices

	Effectiveness Factors (Percent)		
Category	1980 U.S. DOT	1974 California	1952 Hedley
Passive to Flashing Lights	70	64	63
Passive to Automatic Gates	83	88	96
Flashing Lights to Automatic Gates	69	66	68

Source: Ref. 4, 12, and 20

* * *

APPENDIX 3

FHWA-TS-78-214

RAILROAD – HIGHWAY
GRADE CROSSING
HANDBOOK

TECHNOLOGY SHARING REPORT

U.S. DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

AUGUST 1978

Reprinted JUNE 1979

Reprinted December 1979

[LOGO]

* * *

Federal funds currently available for maintenance of control devices at grade crossings. Funds for this purpose must be generated from other sources.

3.3.2 Special State Funds

State legislation regarding grade crossing improvements varies widely with regard to funding, cost sharing and jurisdictional agencies and their authority. Special funding for grade crossing improvements has been authorized in less than one-half of the States. The list changes with each State legislative session. In general, State funds are made available for grade crossings not included in the Federal-Aid system. In several instances, funds are made available to defray a part of the railroad's maintenance cost of traffic control systems. No attempt will be made to describe these special funds.

* * *

3.3.4 Railroad Funding Status

As mentioned in Chapter 1, Federal Highway regulations, national legislation, and court decisions have decreased the railroads' financial obligations for grade crossing improvements. Although the railroads' contribution to the installation of control devices has decreased, the railroads' total financial obligation to crossing safety has increased. This requirement for increased railroad financing arises largely from the increase in the number of crossings that have train-actuated devices, which increases the railroad cost of maintenance.

The financial condition of individual railroads varies significantly. Some railroads are operating under bankruptcy. Other railroads are financially strained to remain in business. The financial conditions of some major railroads is such that their interest in grade crossing improvements is maintained. It may be expected that as the financial condition of an individual railroad deteriorates or improves the company's commitment to grade crossing improvement financing will change. Therefore, no single generalized statement applies to all railroads' ability to, or interest in, participating in grade crossing improvements.

* * *

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRENDA BURKS, as personal representative of the estate of Brian Burks, individually and as Next Friend of WRYAN BURKS, Plaintiffs,	)	Case Number: CIV 98-204-A
vs.	)	
MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation d/b/a UNION PACIFIC RAILROAD COMPANY, and/or UNION PACIFIC RAILROAD COMPANY, Defendant.	)	

DEPOSITION OF RICHARD REYNOLDS
TAKEN ON BEHALF OF THE PLAINTIFFS
OCTOBER 29, 1998
9:00 A.M.
IRVING, TEXAS

---

* * *

Have you done any investigations independently to try to determine how many lives could be saved with lights and gates?

A No.

Q Have you done any investigations to determine how expensive it is to put up lights and gates?

A No. Again, that's an engineering function.

Q If I understand correctly, you believe Cliff Shoemaker is the expert on the question of lights and gates at grade crossings as far as Union Pacific is concerned?

A Yes.

Q You respect his opinion?

* * *

Q And you, also, are aware that the Union Pacific does not seek to put up lights and gates unless that public money is available?

[p. 138] A Unless that agency has authorized it.

Q Authorized it and gotten public funding?

A Well, that comes with the authorization of that agency.

Q You say there's something – you slapped, a book. Where at in the book does it talk about this?

A Okay.

MR. POTTROFF: For the record the book, so inarticulately phrased by Plaintiff's Counsel, is Plaintiff's Exhibit Number 4.

THE WITNESS: Okay. Chapter 5, and it's 5-C-1. The selection on Page V-C-2. The third paragraph says, the selection of traffic control devices at grade crossings is determined by public agencies having jurisdictional responsibility at specific locations.

And then, further down, in one, two, three, four, fifth paragraph, last sentence – oh, no, sixth paragraph, last sentence. As a result, the Union Pacific is not responsible

for determining need or selection of devices at grade crossings.

We abide by the Federal Highway Administration guidelines and the Manual on Uniform Traffic Control Devices.

* * *

Is it your understanding, then, as the person who chairs the most powerful committee in the Railroad, Union Pacific Railroad, on grade crossing safety that your railroad has no independent duty to determine what crossing should get lights and gates?

MS. CALVERT: Objection. That calls for a legal conclusion.

Q (By Mr. Pottroff) I don't want your legal conclusion. I would like your opinion based upon how [p. 142] you're operating your committee you're operating your committee. Is it a presumption that you're making that you have no duty as a railroad to determine if lights and gates ought to go up at any given crossing?

A Well, we make recommendations to the given authorities in the state. We would like for you to do an analysis of this crossing. We feel like through something we look at, maybe, collisions, near hits, whatever the situation is, we would recommend that they do a study on that, an analysis of that crossing. We have made those recommendations, yes.

Q So all you recommend is that the Government come in and look at something?

A The agency who controls that roadway, who's going to have to be the agency that authorizes and tells us what kind of device to put there and all that, yes.

* * *

Q If, indeed, the Government by way of the United States Supreme Court has said, Railroad, you also need to be evaluating your crossings. If that occurred, can you tell me whether or not the Union Pacific has done anything since 1993 to begin an evaluation process of its own crossings to determine the need for lights and gates?

MS. CALVERT: Again, your interpretation contains legal opinions, and I'm going to object on that grounds.

THE WITNESS: Ask the law department and ask Cliff Shoemaker.

Q (By Mr. Pottroff) Okay.

A If it was done, it will be done by them.

Q From the law department, I don't want to know. From the engineering, I don't want to know. From your experience, has the Railroad done anything to begin [p. 144] doing this evaluation process?

A Independently –

Q Correct.

A – no. When we want to do it, we contact the agency. They bring out their traffic engineer and we jointly do it with them. We do not do it independently. We always bring in the agency involved.

* * *

[p. 147] Q Has there been any discussion in your committee about the installation of lights and gates at crossings and having them paid for by the Union Pacific Railroad?

A No to all of your statement.

Q Okay.

A Yes. We talk about installation. Cliff gives

* * *

Plaintiff's Exhibit 4

Union Pacific Railroad

(LOGO)

Grade Crossing Resource Manual
PB20876

Effective: August 1, 1998

Grade Crossing Safety Policies and Programs

---

* * *

C. Traffic Control Device Upgrade Policy

This Policy contains the requirements for upgrading Traffic Control Devices at grade crossings.

The Union Pacific has a specific policy for the upgrading of passive traffic control devices to active traffic control

devices and the upgrading of existing active traffic control devices at grade crossings. This policy is consistent with Federal Highway Administration (FHWA) guidelines and in accordance with the Manual on Uniform Traffic Control Devices.

Information is covered in the following sequence:

1.0 Definitions
2.0 Requirements
3.0 Reference Material

1.0 Definitions

The Federal Highway Administration's (FHWA) Railroad-Highway Grade Crossing Handbook contains the following definitions:

- **Active Traffic Control Device**

  Those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists, positive warning of the approach or presence of a train.

- **Passive Traffic Control Device**

  Those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

2.0 Requirements

Chapter 8 of the Manual on Uniform Traffic Control Devices (MUTCD) describes appropriate traffic control systems for railroad – highway grade crossings. Section 8A-1 states:

"The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority."

Section 8D-1 states:

"The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations."

Active grade crossing traffic control systems range from:

1. Post mounted flashing light signals; to
2. Automatic gates combined with:
   (a) Post mounted flashing light signals;
   (b) Cantilever flashing light signals; or
   (c) Combination of the above.

Any of the foregoing may or may not incorporate a bell.

Due to the large number of significant variables which must be considered, there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval

is required from the appropriate agency within a given State.

It is Union Pacific's policy to abide by Federal Highway Administration (FHWA) guidelines and the Manual on Uniform Traffic Control Devices. As a result, Union Pacific is **not** responsible for determining need and selection of devices at a grade crossing.

3.0 Reference Material

Manual on Uniform Traffic Control Devices, 1988 Edition
Railroad-Highway Grade Crossing Handbook, Second Edition, September 1986.

* * *

APPENDIX 5

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

KIMBERLY R. ALCORN, Plaintiff, v. UNION PACIFIC RAILROAD	Case No. CV97-31927 VIDEOTAPED CLIFFORD SHOEMAKER COMPANY, et al., Defendants TAKEN ON BEHALF PLAINTIFF

VIDEOTAPED DEPOSITION OF CLIFFORD SHOEMAKER, 1416 Dodge Street, Omaha, Nebraska, taken at 10:17 a.m. on May 11, 1999, by Rhonda S. Sansom, CSR, RPR and General Notary Public in and for the State of Nebraska, taken at 8944 H Street, Omaha, Nebraska.

* * *

[p. 11] more information about its own tracks than the federal government does?

A. In terms of railroad-specific items, I would agree with that, which is the reason we share that information with the various governmental agencies.

Q. Would you agree that Union Pacific does not have a program to go out and evaluate public crossings, independent of government agencies, to determine whether lights and gates should be installed?

MR. WILLIAMS: Object to the form of the question.

THE WITNESS: Yes, I believe that was part of a previous response. We do not do that unilaterally or independently.

BY MR. DAVIS:

Q. Would you agree that 90 percent of all crossing collisions would not occur if gates were installed?

MR. WILLIAMS: Object to the form of the question.

THE WITNESS: I would agree that from a probability standpoint gates and lights will reduce the probability of somewhere in the 85 to 90 [p. 12] percentile factor; however, if all crossings were equipped with gates and lights, then I would disagree in that over half the accidents that occur today nationally occur at signalized crossings.

So obviously, if every crossing was signalized, then any incident would be at a signalized crossing.

So in terms of probability of reducing accidents, I agree; in terms of saying at a given location it would reduce incidents flatly by 90 percent, I couldn't agree to that.

MR. DAVIS: I'm going to object to the second part of the question as being nonresponsive after you answered the question about whether or not 90 percent of all fatalities at passive crossings could be prevented by lights and gates.

But now I want to talk to you more about it.

* * *

Q. And lights without gates is not the normal practice these days, is it?

MR. WILLIAMS: Object to the form of the question.

THE WITNESS: There's many installations where flashing lights without gates are appropriate, and that's still being installed. But it's true, the majority of them do include gates nowadays.

BY MR. DAVIS:

Q. Do any – well, systemwide – let me strike that.

So if we just include the ones with gates and lights, then it would be 85 to 90 percent. Correct?

MR. WILLIAMS: Object to the form of the question.

THE WITNESS: Again, that was part of the second qualifier, I believe, in my response.

[p. 20] In a global sense, yes, you would expect accidents to be reduced by about 85 to 90 percent; however, you can't say that necessarily for a given location.

Again, a sizable number of incidents – fatalities and personal injuries – occur at gated crossings.

BY MR. DAVIS:

Q. Would you agree that very few of the signals put in with state or federal funds involve lights without gates because most states have adopted an all-gate policy in recent years?

A. In recent –

MR. WILLIAMS: Object to the form of the question.

THE WITNESS: In recent years, I would agree with that.

BY MR. DAVIS:

Q. Is it true that Union Pacific has never paid for a public crossing in Missouri to be upgraded from passive to lights and gates by itself, on its own?

MR. WILLIAMS: Object to the form of the question.

THE WITNESS: That, I don't know. I

* * *

APPENDIX 6

[p. 1] IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

BRENDA BURKS,

Plaintiff,

vs. Case No. CIV98-204-A

MISSOURI PACIFIC
RAILROAD COMPANY, et al.,

Defendants.

DEPOSITION

The deposition of *Clifford Shoemaker,*

* * *

[p. 4] CLIFFORD SHOEMAKER,

of lawful age, having been first duly sworn on his oath to state the truth, and nothing but the truth, deposes and says:

DIRECT EXAMINATION

BY MR. POTTROFF:

Q. Would you state your full name for the record, please?

A. Clifford Shoemaker, S-h-o-e-m-a-k-e-r, (spelling).

Q. What's your current position with the Union Pacific Railroad?

A. Director of industry and public projects.

Q. You've had that title since about 1988?

* * *

[p. 29] activation at the crossing regardless of train speed.

Q. If you have one of those installations out there that have just lights and you're going to add gates, approximately what kind of cost would you get into there?

A. It's almost the same cost as a brand new installation because typically if it's an older flasher unit you're going to gut the whole thing and put all new circuitry in. And the circuitry is what cost the money. Gates will cost fifteen, twenty thousand dollars just for the gate mechanism, so that's a comparatively lower cost, but the warning circuits, switching the circuits out, the battery backup and the cables and everything that goes along with it is where the money's at.

Q. If you were just to add gates to an existing unit, fifteen to twenty thousand?

A. If you don't do anything to the circuits, that's correct.

* * *

[p. 142] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRENDA BURKS, as personal Representative of the Estate of Brian Burks, individually and as Next Friend of WRYAN BURKS,	)	
Plaintiff,	)	
-vs-	)	
MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation, d/b/a UNION PACIFIC RAILROAD COMPANY, and/or UNION PACIFIC RAILROAD COMPANY,	)	No. CIV-98-204-A
Defendant.	)	

* * *

VOLUME II
CONTINUATION OF THE DEPOSITION OF
CLIFFORD SHOEMAKER
TAKEN ON BEHALF OF THE PLAINTIFF
IN OKLAHOMA CITY, OKLAHOMA
ON DECEMBER 9, 1998

The Honorable Ronald L. Howland, Presiding
REPORTED BY: Rebecca S. Young, CSR, RPR

* * *

[p. 201] didn't know of any research and development projects within your engineering department to try to further develop these alternate technologies, magnetic,

radio, those type of advance warning technologies. Are you aware of any such research and development efforts in the Union Pacific railroad?

A Well, of course, we don't supply materials, per se. We're not in the development business. But what we do do is work with inventors, people that have ideas, that it makes some sense to work with them to get that testing accomplished, such as we are doing with the EVA Company.

Q Okay. How do you – how does the Union Pacific go about promoting the input of inventors or these idealists out there that think they've got an idea on how to save lives at grade crossings?

A If it comes to us up front, I will usually sit down and talk to the inventor, or whoever it may be, and give them input as to what the needs are of a system, such as those outlined in the Manual on Uniform Traffic Control Devices.

There are several criteria in there that must be met before any device is placed on a public roadway. And so it has to be relatively consistent with that, although certainly it encourages research on trying to develop a better mousetrap, so to speak.

[p. 202] So you go through the preliminary processes, but once they get through that, if it appears to meet that need, then there are mechanical issues, repetitive usage of equipment under different weather and weather conditions, we'll say, and different operating conditions, and it has to meet some very rigid operating conditions, and to ensure that that's worked out.

And quite often we'll send them back to their labs to do external testings, ASTM testing, for example, to show that it's at least as credible and reliable as existing equipment.

And then if it gets past all those stages and it appears to be appropriate for use, we'll work with a public agency which has to approve such testing, such as a state highway department typically, to generate a possible test site.

For example, the EVA system, we have selected a crossing in Washington county, which is north of Omaha a ways, where the county engineer and the state department of roads have agreed, once we get through the mechanical side of things, that if that passes muster, if you will, that we are agreeable to installing a complete system as a test.

We will work with inventors through that process.

[p. 203] Q Why doesn't the Union Pacific have its own research and development department in the area of grade crossing technology?

A Again, number one, we do not build or specify the materials. These are all through the public agencies, as these are highway traffic control device, not railroad control.

But that aside, we do work with and have research people available to work with inventors, developers, manufacturers, to field test or lab test different equipment and different ideas that may come about, and/or we refer them to an agency who does have that capable,

such as the US DOT Volpe Center in Cambridge, Massachusetts, such as the Rail Research Lab at Pueblo, Colorado, or whatever is appropriate for the given project.

* * *

But on the other hand, if it becomes – the situation develops where you've got an awful lot of false indications, that's not desirable, so then you may look at some other technology.

Q Okay. I keep going off into interesting conversations with you, Cliff. Back to the question on in-house versus outside research and development, are you aware if there has ever been discussion within the Union Pacific Railroad to establishing an in-house research and development team for crossing safety?

A Not purely for that topic, that I'm aware of.

* * *

[p. 314] crossbucks up with higher grade retro-reflective materials on the crossbucks?

A To study the possible impacts of the different signing. I talked to Joe Kyle about that just the last few days. They are doing a human factors study on that, to see if that change in signing has any significant driver behavioral change.

Q That's, in essence, replacing crossbucks that the railroad already had the responsibility for maintaining?

A Correct.

Q But the benefits that are obtained by the railroad is that they get new crossbucks paid for by federal money, 90 percent?

A Correct.

Q And they get to argue that now those crossings are preempted. If somebody gets in an accident at that crossing, the preemption argument can be made that indeed this crossing has been upgraded according to some state or federal standard; therefore the argument that it needs to be upgraded cannot be made.

MR. HART: I'm going to object. It calls for a legal conclusion.

A That's not the intent of the project. The project is to evaluate the effectiveness of a brighter [p. 315] sign and also putting stripes on the mast to create more of a goalpost effect, if you will, of passive crossings, and just see if there's any significant change in driver behavior. That's the intent of the study.

Q (By Mr. Pottroff) But you've been advised of secondary benefit to the railroad of the preemption argument being available.

MR. HART: Objection. Leading.

Q (By Mr. Pottroff) Is that correct?

A That could be an argument. That's not the trust of the project.

Q But you are aware that is an argument that's made when those type of projects are completed?

A I've heard that legal argument.

Q And that's an argument that's used in open court by the railroads' lawyers once those projects have been completed?

MR. HART: Objection. Leading.

A I've heard that in some cases. I'm not sure if it's routinely used in open court, as you imply, but I've heard it.

Q (By Mr. Pottroff) The other projects that will have the effect of taking money out of lights and gates programs and putting them into other hazard eliminations would be crossing surface repairs, correct?

[p. 316] **A Replacements.**

Q Those are projects which the railroad would have had to have paid for themselves as regular maintenance repair items if there wouldn't have been federal money taken out of the federal aid program, correct?

MR. HART: I object to the characterization of the program and of your characterization of the law in regard to it.

A It's the states' option as to how they spend those dollars. And, yes, by statute, the railroad is typically required to maintain the crossing surfaces. Or if the state elects to upgrade the nature of that roadway to some level above what it was being maintained at, they certainly have that option.

The argument being or the logic being, in a federal memorandum some time ago back in the seventies, when that first came about, is that the driver could theoretically be taking more time being concerned with

the geometrics, if you will, of the crossing, and not spending enough time on the warning device.

Typically, in fact, by federal law, the warning devices have to be addressed or already in place before the dollars can be spent on the surface. But usually it's as a package, not just a surface.

Q (By Mr. Pottroff) But my point is, those are – [p. 317] those funds are being spent on items that are the total responsibility of the railroad, in any event.

MR. HART: Going back to duty, again, I'm going to have to object. Are we going to save this for the judge?

Q (By Mr. Pottroff) You know what the railroad is responsible for, ties, ballast, right-of-way, crossing surface.

A Except for on the limited number of times – we'll talk Oklahoma, but it's pretty true elsewhere – when they do use federal monies for the surface, they also are renewing the approaches, doing some geometric changes, whether it be a vertical curve or curve of the gutter, or some other work to improve the highway system as a whole, and the crossing certainly is just a part of that system, but there are federal funds occasionally used for that.

Q I understand that they are used for that on occasion. My point is, if the federal funds weren't used on it, it would be the railroad's responsibility to spend their money on crossing surfaces.

A To the limits of the statute that covers that, that's correct.

Q And so these federal monies that are actually coming out of the lights and gates kitty are to pay for crossing surfaces that would have otherwise been the [p. 318] responsibility of the railroad?

A Not exactly, they're taken out of the optional kitty, if you want to call it that. The money that has to be spent on lights and gates or warning systems is spent for that purpose. The optional money, the state can use it for bridges, they can use it for crossing surfaces, they can use it for almost anything they want pertinent to safety.

Q Railroads are actively soliciting the use of those funds for crossing surfaces and state-wide or corridor-wide crossbuck programs and lens replacement programs, are they not?

MR. HART: Objection. It's leading. It's argumentative.

Q (By Mr. Pottroff) Union Pacific, in particular the people that work for you.

A Generally speaking, again, if it's part of a package deal, we might encourage the surface, but we don't go after surface projects as standalone projects. We do encourage corridor projects, including passive signing upgrades. For the price of one signal installation, you might address 100 crossings with passive signing. And if the test that Joe Kyle has lined up is successful, then it was an excellent project.

Q What about lens replacement programs? Those are [p. 319] those, as I understand it, programs where you want federal assistance to go upgrade from the old 8-inch

roundel to a 12-inch lens, which is the more state-of-the-art lens.

A We have had some of those state-wide programs, that's correct.

Q And that is money taken out under the hazard prevention part of the federal funding program?

A It could be out of either side.

Q Okay.

A And, again, for a fraction of the cost for one new installation, you might do 10 or 20 crossings, enhancing the safety if crossings already had signals but maybe they weren't state-of-the-art.

Q But if what you told me before was correct, that was already the responsibility of the railroad to keep upgrading their crossings, from a maintenance point of view, to get rid of obsolete equipment when it becomes obsolete.

A Eight-inch lenses are not obsolete. They are still a current standard. He have opted, at Union Pacific, to do a lot of that at our own expense.

Q Current standard for whom?

A The guidelines as described in the MUTCD, which are the devices that are available – current device available to put at public crossings.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA
BRENDA BURKS, as personal)
representative of the Estate)
of Brian Burks, individually)
and as Next Friend of)
WYRAN BURKS,)
)
Plaintiff,)
)
vs.) No. CIV-98-204-A
)
MISSOURI PACIFIC RAILROAD)
COMPANY, a Delaware)
corporation, d/b/a UNION)
PACIFIC RAILROAD COMPANY)
and/or UNION PACIFIC)
RAILROAD COMPANY,)
)
Defendant.)

VOLUME III
OF THE DEPOSITION OF CLIFFORD SHOEMAKER
TAKEN ON BEHALF OF THE PLAINTIFF
IN OKLAHOMA CITY, OKLAHOMA
ON DECEMBER 10, 1998
The Honorable Ronald L. Holland, Presiding
REPORTED BY: Judy Thompson, CSR

* * *

[p. 383] signals."

How long has that message been in the Operation Lifesaver presentations, if you know?

A A long time, certainly since the beginning of the Trainers' Guide, this guide we're looking at now. And that's been a true statement for many years.

Q If I were an ordinary citizen with no knowledge about grade crossings, would you want me to come away with the belief that crossings with gates and lights are more dangerous than crossings without them?

A No. There's no hidden message in this document. It's simply to advise the drivers there is a responsibility that they have, as well as the other people involved in the grade crossing, highway-rail program, and that is to heed the warnings. But they also have the responsibility to look for trains, to listen for trains and so forth, regardless of what type of device is out there. Statistically, this is nothing to do with Operation Lifesaver, we discussed this yesterday, that flashing lights and gates or flashers alone will have, in the global sense, an effect of reducing accidents under most conditions.

[p. 384] Certainly, where the signals have been installed in the past, you have a higher, we'll call it exposure, that being more trains and more vehicles. And also we discussed if you assume, say, a 90 percent probability of reducing accidents, if you push a gazillion vehicles through one crossing, and you still only expect 90 percent reduction, you're still going to have that 10 percent. But because I believe the successfulness of the joint program we've discussed, allowing the state highway

agencies to select the priorities where they have the highest probability of incidents, and that's where the signals have gone in for many years, we're still reducing the accidents. But because of increased traffic flow, more incidents are going to occur at signalized crossings. Certainly, if you signalize every crossing in the country, which you have suggested, possibly, then any incident you had would be at a signalized crossing. So statistics are statistics. But the message here is no hidden messages and that drivers need to be aware of the potential danger of all crossings whether they're signals or not.

Q The fact then that's represented in the

* * *

APPENDIX 7

IN THE DISTRICT COURT OF CANADIAN COUNTY
STATE OF OKLAHOMA

BRENDA AND EUGENE SPENCE, individually, Plaintiffs, vs. MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation, d/b/a UNION PACIFIC RAILROAD COMPANY, and KERRY S. KNUTSEN, and/or UNION PACIFIC RAILROAD COMPANY, Defendants, and TRAVIS SPENCE, an incompetent person by and through his guardians, BRENDA AND EUGENE SPENCE Plaintiffs, vs. MISSOURI PACIFIC RAILROAD COMPANY, a Delaware Corporation, d/b/a UNION PACIFIC RAILROAD COMPANY, and KERRY S. KNUTSEN, and/or UNION PACIFIC RAILROAD COMPANY, Defendants.	Case No. CJ-97-1 Consolidated with: CJ-98-287

DEPOSITION OF CLIFFORD SHOEMAKER
TAKEN ON BEHALF OF THE PLAINTIFFS
OCTOBER 21, 1999
TULSA, OKLAHOMA

* * *

[p. 159] Q Are you aware of what percentage of traffic, that's potential encounters between trains and cars, go through that 25 percent of the crossings?

A Somewhere around 80 percent, if I recall the numbers.

Q So 80 percent of the traffic is going through that 25 percent of the crossings?

A 70 to 80. Somewhere in that – I don't remember the exact number, but certainly a majority of the traffic. That is correct.

Q And half of the accidents are then occurring where lights and gates don't exist?

A The reverse of what I said earlier. That's correct.

Q And those accidents are preventable to the tune of 90 percent by the installation of lights and gates?

A Theoretically, based on probability indices.

Q Now, those crossings that have lights and gates, there's any number of reasons why accidents occur there?

A Just like there's any number of reasons why they occur at passive crossings.

Q And as long as there's crossings, we will have some accidents at the crossings?

* * *

APPENDIX 8

IN THE DISTRICT COURT OF CADDO COUNTY
STATE OF OKLAHOMA

STEVE MYERS and VIOLET MYERS, individually, personally, and in Behalf of the Estate of LESA MYERS, and MELISSA ROBERTS and STEVE MYERS,	)	
Plaintiffs,	)	Case No. CJ-97-49
vs.	)	Consolidated with
MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY, and/or UNION PACIFIC RAILROAD COMPANY, and JIM Q. COLLINS,	)	Case No. CJ-97-46
Defendants.	)	

DEPOSITION OF CLIFFORD SHOEMAKER
TAKEN ON BEHALF OF THE PLAINTIFFS
APRIL 1, 1999
9:00 A.M.
OMAHA, NEBRASKA

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* * *

Q How much does it cost, if you know, and you can give me an approximation, to add just gates to a light installation?

A Just the gates, themselves, if somebody who knows circuitry changes, are about, oh, say, $15-, $16,000 per gate mechanism.

Q Now, is that per gate, would be one for each said [sic] of the road, then?

* * *

[p. 59] hierarchy or tenure, or anything like that, that determines who's going to be next on the Board of Operation Lifesaver?

A To a degree, yes. The AAR does have a representative, and Mr. Dettman is the current representative. Prior to that was Paul Oakley, O-a-k-l-e-y.

Amtrak has a representative.

The Program Development Council provides three members; the current chair of the PDC, the past chair, and the chair-elect –

Q Okay.

A – are Board of Director Members.

Q All right. You said the PDC?

A Program Development Council.

Q Okay.

A That's the third group down on the chart.

Q Okay.

A So currently, Eddie Gilbert from Norfolk Southern is the current chair of the PDC, therefore, he's on the Board. I am the immediate past chair of the PDC and on the Board, and Lynn Johnson from CSX is the chair-elect for the PDC, so he is on the Board.

Another hierarchy is the Railroad Progress Institute, that they have a member on the Board [p. 60] continuously.

ASHTO has a full-time member and, currently, Otto Sonnefield. (All phonetic.) he happens to be the chairman this year, and then, Erick Jacobson is on the Board, and that's because we have an opening, a standing member on the Board that happens to be a state coordinator for Operation Lifesaver, and that will rotate.

Q You try to keep one coordinator on?

A Correct.

Q Okay.

A To provide interface with the state activities to the Board. The rest of them will have a short line representative. Again, right now, it's Ronnie McCaron, (Phonetic.) with Wisconsin Central, is the current member, and that rotates different carriers periodically.

We try to have at least one commuter or passenger operation besides Amtrak, and that currently is Richard, Rick Tidwell, from Metro, the Chicago operations.

Q Chicago.

A But that's kind of how it is set up. We've got the – RPI being the manufacturers side of things, the supply side, plus Amtrak, plus short line, plus a commuter operation, plus the highway agencies. By – I [p. 61] don't know if it's Constitution or what – Federal Highway and Federal Rail folks cannot sit on the Board.

Q Okay.

A In fact, that was probably the eleventh. We asked Jolene Molitoris (All phonetic.) to be on. She accepted, and then she had to turn around and leave, because her constitution, or bylaws, or whatever, don't allow for them to sit on a –

Q On Operation Lifesaver?

A Whatever. On any board, I guess.

Q Okay.

A But ASHTO does allow it. Of course, ASHTO is the trade organization, if you will, for the state highway departments.

Q Right.

A Not unlike the AAR is for the railroads.

Q Do you know if Otto – what is his name, Schoenfield?

A Sonnefield.

Q – Sonnefield has any specific expertise in railroad grade crossing safety or some niche in ASHTO that is railroad related?

A Yes. He does.

Q Tell me what that is to the best of your knowledge.

* * *

[p. 146] A Correct.

Q And that they're important aids in warning you of dangers.

A Correct.

Q But over half of the collisions occur at crossings equipped with automatic signals.

A Correct.

Q Do you believe that that imparts to the public the message that over half of the collisions occur at crossings with gates?

A I don't interpret it that way.

Q No, because you know exactly what the word choices were, don't you?

A Yes. And I know that the statistics are.

Q The world [sic] choices was automatic signals, because it's not true that over half the crossing accidents occur at ones with automatic gates.

A That's very true.

Q In fact –

A Absolutely true. I agree.

Q In fact, a very fraction occur at crossings with gates?

A It's something, like, 10 – between 10 and 20 percent.

Q But the public, if they listened to this

* * *

APPENDIX 9

App. 50

DEPOSITION EXHIBIT 5

THE

UNION PACIFIC RAILROAD

AND

GRADE-CROSSING SAFETY

A Report By

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Transportation Economist
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August 1999

This report addresses the issue as to whether economic practices and policies of the Union Pacific Railroad (UP) have adversely affected the adequacy of safety at that railroad's grade crossings. (Attachment No. 1 is a statement of the author's qualifications.) Based on an analysis of empirical evidence since the Staggers Rail Act of 1980, the report concludes that: *While the UP could well have afforded to provide adequate safety facilities at all of its passive grade crossings, and that while the benefits to society from such installations would have outweighed the costs, the railroad shirked its public responsibility by choosing solely economic gains over saving lives. Thus, in the case of grade crossings, the UP has displayed a conscious disregard for safety.*

I. The UP has an inherent public responsibility to provide for safe grade crossings.

Unlike most other companies in the United States, the UP has an inherent *public nature.*[1] While privately owned the UP was birthed and developed in the mid-1800s with massive public aide.[2] Then in 1887, the federal government regulated railroads in a manner different than other industries and has continued to treat railroads as a rather unique industry. Railroads are immune from antitrust laws affecting other industries.[3] They benefit from special anti-strike legislation,[4] bankruptcy provisions[5] and public-assistance.[6] Railroad employees fall under their own workers' compensation,[7] unemployment insurance,[8] and retirement systems,[9] rather than being under state programs and federal social

security. And the country's *National Transportation Policy,*[10] and a host of other transportation legislation reflect the public nature of railroads.

The public nature of the UP is not a one-way street as the railroad has obligations to the public which licensed and is affected by it. From an economic viewpoint, the UP has a common-carrier obligation and must provide joint rates, through routes, non-discriminatory service and reasonable rates. From a societal perspective, the UP must provide reasonably safe facilities and operations, notwithstanding federal assistance. In fact, five years after the initiation of federal assistance for grade-crossing facilities,[11] the Federal Highway Administration (FHWA) affirmed that railroads have responsibility for improving grade-crossing safety. More specifically, in 1978 the FHWA stated that:

> *It may be expected that as the financial condition of an individual railroad deteriorates or improves, the company's commitment to grade crossing improvement financing will change. Therefore, no single generalized statement applies to all railroads' ability to, or interest in, participating in grade crossing improvements.*[12]

The FHWA's position reflected public policy in this country – that limited public funding supplements, rather than supplants, corporate public responsibility. This is patently obvious in the case of the UP – the country's largest railroad, with 34,000 miles of road operated.[13] 32,000 public grade crossings,[14] and 432 billion ton-miles of traffic[15] – impeding the free movement of people and goods. With trains outweighing automobiles by a 3,000-to-1 ratio[16] and taking a mile or so to stop, it is incumbent

upon the UP to provide adequate safety to those crossing its publicly-vested track structure. If it were not for the railroad, there would be no grade-crossing accidents.

Recently, the UP's responsibility to provide safe crossings was again recognized by the federal government – this time, by the Surface Transportation Board (STB) in its review of the UP's acquisition of the Southern Pacific Railroad (SP) in 1996. In conducting its environmental impact analysis, the STB recognized that upgraded facilities were desirable at a number of post-acquisition UP grade crossings, including the installation of signals and gates. In response, the UP agreed to fund such facilities in among other areas, the cities of Reno, Nevada and Wichita, Kansas. In these situations, the UP voluntarily funded such facilities.[17]

II. The root goal of the Staggers Rail Act of 1980 was to eliminate the capital shortfall of railroads, thus enabling them to provide adequate and safe service.

The year 1980 was adopted as the base year for statistical analysis for three reasons. First, the Staggers Rail Act was enacted in that year,[18] deregulating much of the economic behavior of railroads and culminating [sic] a series of favorable railroad legislation enacted during the 1970s.[19] Second, the Staggers Rail Act recognized that railroad earnings were *insufficient to generate funds for necessary capital improvements*,[20] somewhat excusing the industry for past investment shortfalls, but indicating that the anticipated turnaround of railroad finances

would require the fulfillment of economic and social obligations. More specifically, the *Rail Transportation Policy* section of the Staggers Rail Act identified expected benefits of railroad deregulation which would accrue to four parties as follows:

1. *Customers*: Shippers were to receive reasonable rates, sound transportation, and the avoidance of undue concentration of market power.
2. *Shareholders*: Investors were to realize adequate returns.
3. *Labor*: Employees were to receive *fair wages and safe and suitable working conditions.*
4. *General Public*: The public was to enjoy a rail transportation system *without detriment to the public health and safety.*

Finally, using 1980 as a base year provides enough of a record to identify trends, eliminate anomalies, account for the impact of railroad mergers, and thus identify the economic behavior of the UP over an adequate time period.

III. At the time of the enactment of the Staggers Rail Act, unlike most railroads in the country the UP was financially sound.

The record is well documented that the railroad industry was in the financial doldrums in the decades following World War II.[21] In 1976, Conrail (with substantial federal aide was created out of six bankrupt railroads.[22] Other bankrupt railroads were partially abandoned and partially merged into other operating systems. Overall railroad earnings were at extremely

depressed levels and maintenance was often deferred. The Staggers Rail Act concluded that railroad earnings were *the lowest of any transportation mode and insufficient to generate funds for necessary capital improvements*, and that without the legislation railroads would experience a capital shortfall of $16-$20 billion by 1985.[23] However, the UP was an exception to the dire financial condition of the railroad industry. For example, as shown below, the UP enjoyed rates of return on equity (ROE) which were far above the industry as a whole. As stated in the UP Corporation's (UPC) 1980 annual

Year	ROE: All Railroads	ROE: UP[24]
1978	1.3%	10.3%
1979	5.4%	10.2%
1980	6.0%	10.7%

report, *Union Pacific Railroad posted an increase in earnings in 1980 for the fifth consecutive year*. In 1980, the UP realized operating revenue of $2.0 billion, earned railroad income of $214 million, and made capital expenditures of $423 million.[25] Of the 35 Class I railroads operating in 1980, the UP ranked third in traffic volume, fifth in operating revenue, seventh in miles of road owned, and first in railroad earnings.[26]

IV. In spite of its financial health, the UP reacted to the Staggers Rail Act by focussing on massive cost cutting.

The UP applied its new-found economic freedoms under the Staggers Rail Act to conduct a program of massive cost cutting. In its 1982 annual report, the UPC stated that, *On the cost cutting side, UPRR continued to be*

an industry leader. In 1980, the UP's cost of producing a ton-mile of traffic was 2.19 cents.[27] while in 1996[28] the figure dropped to 1.55 cents,[29] equating to a 0.64 cent reduction, or a 29% decline in operating costs over the 16 years. Equally startling is that the 29% cost reduction was made in spite of an 88% increase in railroad inflation.[30] In essence, the 1.55-cent cost in 1996 is equivalent to 0.82 cents in 1980 dollars (inflation index of 100/188 x 1.55 cents), so that in inflation-adjusted terms, the UP's cost savings in 1996 compared with 1980 is 1.37 cents (2.19 cents minus 0.82 cents), equating to a 63% reduction in operating costs. The UP's cost savings in the single year of 1996 can be calculated in both reported and inflation-adjusted terms as follows:

1. Reported: 0.64 cents savings x 332.861.334.000 ton-miles[31] = $2.1 billion
2. Inflation-Adjusted: 1.37 cents avoidance x 332.861.334.000 ton-miles = $4.6 billion

Similar calculations can be made for all other years between 1980 and 1996, but these calculations would require adjustments for the inclusion of *special charges* (non-reoccurring costs) which were reported by the UP as operating expenses. Furthermore, similar calculations can also be made for the years 1997 and 1998, but the results would distort the overall trend because they would include the inefficiencies related to the acquisition of the SP. For the purpose of this report, it is sufficient to conclude that the UP's emphasis on cost cutting since deregulation in 1980 resulted in the avoidance of tens of billions of dollars in operating expenses.

V. At the heart of the UP cost cutting was a significant reduction of its labor force.

Because the UP acquired various other railroads since 1980, employment reductions must account for the addition of other railroads' employees, including: (1) purchase of Missouri Pacific and Western Pacific railroads in 1982, (2) acquisition of Missouri-Kansas-Texas Railroad in 1988. (3) purchase of remaining stock in Chicago & North Western Railroad in 1995, and (4) acquisition of Southern Pacific Railroad in 1996. After adjusting employment levels for these purchases, the result of the changes in UP employment from 1980 to 1998 was a reduction of 21,647 employees.[32] What is astonishing about the termination of 21,647 positions is that UP traffic increased by 31.4% during the 18-year period between 1980 and 1998.[33] If UP had retained the terminated employees and in 1998 provided them with the average annual compensation of $72,480,[34] the railroad would have incurred an additional operating expense of $1.6 billion in that single year.

UP maintenance-of-way employees were not excluded from the employee reductions. As shown in Attachment No. 2, from 1980 to 1998 the UP terminated 4,192 employees under the classification of *Maintenance of Way and Structures*, resulting is [sic] a savings of $2.6 billion in compensation – measured by the dollars saved in each year. If measured by the value of current dollars, the savings would be substantially more. Thus, the reduction in force was a significant part of UP's cost-cutting program. Other cost savings were realized by the abandonment and sale of light-density lines, economies of scale and density associated with mergers, efficiencies

associated with new technology, and measures to increase productivity.

VI. The monies saved by the UP in the post-Staggers Rail Act years were used to benefit company executives, other employees, shareholders and shippers.

There were a number of beneficiaries of the UP cost cutting, but the level of benefits were far from uniform as discussed below.

1. *Executives*: UP executives were richly rewarded for the cost cutting largely because they had financial incentives to slash operating expenses. Executives pay at the UP is divided into two main segments: annual pay and long-term compensation. Aside from salaries and fringe benefits, annual pay includes bonuses based on the level of the ROE.[35] As shown below, executive bonuses awarded to UPC employees increased to over $100,000 per person in 1996.[36] Furthermore, in 1997 when UP earnings were below the ROE required to trigger

Year	No. of Executives	Total Payments ($ Millions)	Bonus Per Executive
1993	190	$17.8	$94,000
1994	195	17.1	92,000
1995	149	14.9	100,000
1996	138	13.8	112,000

executives bonuses, the corporation still awarded $7.1 million to 154 executives (an average of $46,000 each) because *a balance was available in the reserve fund from prior*

years.[37] In essence, UPC used past surplus profits to reward its executives even though they did not meet the required performance standards.

On average, UP executive compensation (excluding stock) more than doubled from $45,232 in 1980 to over $90,620 in 1998.[38] This compares with a national inflation rate of 87% over the 18-year period.[39] UP executives probably earned an average compensation in excess of $100.000 in 1998 because the reported number represented *executives, officials and staff assistants*, due to a change in reporting format. Since executives earn more than officials and staff assistants, the reported 1998 executive compensation was understated as part of the broader category.

Aside from their annual pay, UP executives receive long-term compensation in the form of stock options and grants of retention stock.[40] These stock awards are based on UP financial performance and are made to tie the economic interests of UP executives with those of the shareholders.[41] At the end of 1995, the president of the UP possessed $5.3 million worth of stock grants.[42] Furthermore, he owned 325.321 shares of common stock valued at $21.5 million.[43] Clearly, UP executives were well rewarded for their cost-cutting success and ensuing increases in profits in the years following deregulation.

2. *Other Employees*: UP employees other than executives received monies from the railroad's post-deregulation performance in two ways. First, those employees who were terminated received substantial severance payments. In 1986 and 1991 the UP recorded *special charges* totaling $1.4 billion – primarily for employee buy-outs.[44]

Second, already among the highest paid employees in the United States for similar type of work. UP employees received added compensation significantly above the rate of national inflation. In 1980, UP employees received an average wage of $25,523[45] and fringe benefits valued at $5,998[46] for a total annual compensation of $31.521. In 1998 the average wage was $54,496 with added fringes of $17.984 for a total annual compensation of $72.480.[47] Thus, the average annual wage of UP employees increased by 130% from 1980 to 1997, significantly above the 87% rate of national inflation during that same period.

3. *Shareholders*: Equity investors benefitted in a variety of ways from the UP's post-Staggers Rail Act financial gains. First, the UP spent billions of dollars to acquire other major railroads,[48] thereby strengthening its market position. From 1980 to 1998, the UP share of the railroad market increased as follows: miles operated – from 5.2% to 28.1%; operating revenue – from 7.1% to 27.8%; and, revenue ton-miles – from 8.6% to 31.4%[49] Second, the value of shareholder's equity increased from $1.5 billion in 1980 to $8.8 billion in 1998.[50] Third, the UP's net railroad operating income increased from $214 million in 1980 to about $1 billion in the late 1990's.[51] Fourth, the UP's ROE increased from 10.7% in 1980 to 13%-17% in the late 1980s and middle 1990s.[52] And finally, the UP paid out dividends totaling $5.6 billion between 1981 and 1998.[53]

4. *Shippers*: The constraint of railroad freight rates since 1980 is well documented and has been noted by the Association of American Railroads (AAR), Interstate Commerce Commission, STB, General Accounting Office,

and a number of individual studies (e.g., Brookings Institution). As expected, freight rates were most compressed where competition was greatest, such as for intermodal traffic. Where demand was relatively inelastic, UP freight rates tended to rise up to the level of inflation. In fact, a significant number of UP rates fall under contracts which contain escalator clauses tied to the rate of inflation. In 1998, UP realized revenue of 2.05 cents for every ton-mile of traffic it handled, compared with 2.53 cents in 1984.[54] While this reduction reflects rate compression, a taper in the rate structure, average longer hauls, and shifts in traffic toward relatively heavier (more dense) commodities.[55] It is undeniable that shippers benefitted from railroad rate compression since enactment of the Staggers Rail Act.

VII. In spite of its financial gains, the UP has not provided funds for adequate grade-crossing safety facilities.

The UP has not repressed its denial of responsibility to provide for the installation of adequate grade-crossing safety facilities. The railroad has taken such a position in judicial proceedings and has openly stated that such responsibility rests solely with the public. No mention of capital expenditures for installing such facilities as signals and gates is in its annual reports or its policy statements. The UP's denial is reflected in the composition of safety facilities at its crossings. Of the 31,818 UP public grade crossings in 1997, only 7,350 (23%) had crossing gates, and 19,723 of the crossings were *passive* in that they had no gates or flashing lights.[56]

Aside from the lack of capital expenditures at grade crossings, it appears that UP's maintenance expenses at grade crossings declined by 50% in inflation-adjusted dollars from 1980 to 1996, as shown below. With the inclusion of the SP in 1997, the UP's maintenance

		1980	1996
1.	UP maintenance expense at grade crossings	$3,135,000	$8,070,000[57]
2.	Number of crossings	7,761	21,479
3.	Maintenance expense/crossing	$404	$376
4.	Inflation-adjusted maintenance/crossing	$404	$200

cost per grade crossing increased to $522 ($16.6 million divided by 31,818 crossings), but the inflation-adjusted expense of $278 was still substantially below the 1980 level.[58]

VIII. The societal benefits of safe UP grade crossings outweigh the costs.

Over the past six years there were more deaths and injuries at UP grade crossings than at any other of the 46 freight, passenger, terminal and commuter railroads reporting such casualties to the Federal Railroad Administration. Between 1992 and 1997, the UP experienced an annual average 143 fatalities and 406 injuries at its grade crossings, accounting for 26% and 23% respectively of the industry totals.[59] For the railroad industry as a whole, 80% of the grade-crossings accidents occur where there

are no gates.[60] Evidence indicates that many of these accidents would have been avoided if gates had been installed. For example, a U.S. Department of Transportation publication declared that: *Active traffic control devices have proven to be an effective method of improving safety and operations at railroad-highway grade crossings.*[61] The position of this publication was based on a 1980 study showing the effectiveness (% reduction in accidents due to crossing improvement) of upgrading grade-crossing devices as follows:[62]

Upgrade	Percent Effectiveness
- Passive to flashing lights	70%
- Passive to automatic gates	85
- Flashing lights to automatic gates	69

Based on the above evidence (1992-1997), by installing signals and gates at its passive crossings, the UP could have been expected to eliminate a substantial portion of its 143 average annual grade-crossing deaths and 406 injuries. Even if the impact from signals and gates was only a 40% reduction in accidents, over the 25-year expected life of a crossing gate, over 1,400 lives would be saved and over 4,000 injuries avoided. Other savings from gated crossings would include the costs to the railroad, expenses incurred by local communities, the cost of damaged cargo, and possibly the catastrophic consequences of a major hazardous materials event. There are numerous and widely varying estimates of the value of lives and estimating the cost of injuries, hazardous-materials spills, etc., is a dubious undertaking. Thus, it

appears reasonable to simply conclude that if the UP installed signals and gates at its passive crossings, countless billions of dollars of societal benefits would be realized.

On the cost side, it is estimated that the net (after tax) cost to the UP of installing signals and gates at 20,000 grade crossings, over the 25-year expected life of those facilities, would approximate $325 million, or $13 million annually. The calculations presented below are based on: (1) an average installation cost of $100,000 per signal and gate set, (2) a 25-year facility life, (3) UP paying 41.5% of the installation costs, representing the midpoint between 33% and 50%, (4) an ability of UP to pass on 40% of the installation costs to its customers, and (5) a UP combined state-and-federal income tax rate of 37%.

20,000 passive grade crossings
x $100,000 (installation cost per crossing)
= $2,000,000.000 total cost
25 years (life of signals and gates)
= $80,000,000 cost per year
x 41.5% (UP share of cost)
= $33,200,000 initial annual cost to UP
x 60% (UP percent not passed on to customers)
= $19,000,000 pre-tax annual cost to UP
x 63% (non UP income-tax deduction portion)
= $12,500.000 net annual cost to UP, rounded to $13 million

In essence, for a UP net cost of no more than $13 million annually over a 25-year period, over 1,400 lives could be saved, 4,000 injuries avoided, and the risk of hazardous materials spills greatly reduced. Surely, the societal benefits of installing signals and lights are far in excess of the projected costs for the UP.

IX. UP can well afford to provide signals and gates at all of its passive crossings.

By any reasonable standard, the UP can well afford to fund the installation of signals and gates at its passive grade crossings. A $13 million annual expenditures pales in comparison with the tens of billions of dollars of UP cost reductions and inflation avoidance since deregulation, with the UP's own estimate of an annual savings of $660 million from the SP acquisition,[63] and with company earnings of up to a billion dollars annually. The $13 million is less than 3% of the UP's estimate of a $450 million (after tax) cost in 1997 due to post-merger congestion.[64] And the $13 million annual expenditure, even if multiplied by the 25-year life of signals and gates, resulting in an expenditure of $325 million, is but 2% of the $14 billion in increased shareholder value attributed by the UPC to its chairman who retired on January 1, 1997, and who was awarded a $4 million bonus and a five-year contract as a consultant.[65]

Consider the comparison of a $13 million annual cost to the UP with some financial statistics from its 1996 performance (the year prior to the SP inclusion):

Financial Measure in 1996	Amount[66]	%13 Million Is:
1. Railroad Operating Revenue	$6.7 Billion	0.19%
2. Railroad Operating Expense	5.2 Billion	0.25
3. Net Railroad Operating Income	1.0 Billion	1.30
4. Net Shareholders' Equity	5.6 Billion	0.23
5. Net Investment	14.0 Billion	0.09
6. Cash Flow From Operations	1.6 Billion	0.81

Furthermore, the $13 million is less than the cash bonuses given to UPC executives in each year between 1993 and 1996, and is minute in contrast to the $4.1 billion purchase price of the SP and even the $525 million that UP invested in Mexican railroads in 1988.

Finally, two additional comparative points are relevant. First, even if the $13 million were paid out of dividends, it would not have a meaningful effect on investors. For example, in 1996 the $1.72 annual dividend[67] would have been reduced by 5 cents (1 cent per quarter to $1.67, thereby generating $13.7 million from the 274,595,151 shares[68] of common stock. And second, the grade-crossing upgrades could have been furnished out of UP surplus profits. For instance, in 1996 the UP's executive bonus program was triggered at an 10% ROE, with maximum bonuses ending at a 12% ROE. Thus, when the UP earned a 17% ROE in that year, it realized a

5 percentage point premium, or *surplus* above the maximum-bonus level. Applying the 5% premium to shareholders' equity valued at $8 billion in 1996 results in about $400 million of premium earnings in a single year – enough to pay the entire $325 million UP cost of installing signals and gates at 20,000 grade crossings.

X. The failure of the UP to invest in adequate grade-crossing safety is detrimental to those people crossing the track structure and living near grade crossings.

Based on the quantitative and qualitative evidence in this report, it is clear that the UP could well have afforded to install signals and gates at all of its passive grade crossings, and that the benefits to society from such installations would have outweighed the costs. Instead, the UP shirked its public responsibility by choosing solely economic gains over saving lives. Railroad economics and public responsibility are not an *either/or* choice. Rather, a reasonable balance is required which is absent in the case of the UP.

It appears that the UP believed that the economic benefits of investing in adequate grade-crossing safety did not warrant the cost. Consequently, the UP used tens of billions of dollars derived from cost cutting (mainly from terminating employees) to: (1) reward top executives for their cost-cutting successes, (2) pay other employees relatively highly compensation. (3) provide larger returns and dividends to its investors, (4) increase its already-substantial market share by purchasing other

major railroads, and (5) constrain prices to selected customers. The large amounts associated with these actions are in stark contrast to the UP's lack of expenditures on the installation of adequate grade-crossing facilities.

The UP's policy of denying responsibility for adequate grade-crossing safety and inappropriately relying on a limited public funding program not only leads to inadequate capital investment, maintenance, and personnel levels related to grade crossings, it also breeds an overall staff attitude of ambivalence and negligence. The end result is increased risk to the people and goods crossing UP's track structure. It is no wonder that as stated in the UP's 1997 annual report to shareholders. *FRA reviewed UPRR's operations and concluded that safety problems at UPRR were the result of amount other things a less of focus on safety personnel shortages and crew management problems.*

ENDNOTES

1. In fact, as early as 1837 a court found that railroads have a *public nature.* In *Bloodgood v. The Mohawk & Hudson Railroad Co.*, 48 Wendell (N.Y.) 9.21. a New York courted stated: *Because the legislature permitted the company to remunerate itself for the expense of constructing the road, from those who should travel upon it, its private character is not established; it does not destroy the public nature of the road, or convert it from a public to a private use.*
2. Like other railroads, the UP (including its predecessors) received free land surveys, the right of eminent domain, land grants, low-interest loans, bond guarantees, tax exemptions, and cash grants. In fact, according to the 1934 *Report of the Federal Coordinator*

of Transportation, the UP and two of its recently-acquired railroads – the Southern Pacific and Chicago & North Western – collectively received 52 million acres of land grants.

3. Immunity from the antitrust legislation governing other industries (Sherman Act, Clayton Act and Federal Trade Commission Act) was provided to railroads through the Transportation Act of 1920 (Title 49, chapter 107, Subchapter 1, Section 10706). According to Frank N. Wilner, in *Railroad Mergers, History, Analysis Insight* Simmons-Boardman Books, Inc., 1997, pp. 35-36) *Every railroad unification approved by the ICC would be immune from antitrust challenge.* Indeed, the ICC wasted no time in telling trust busters to keep their distance and the Supreme Court corrected any misunderstanding in stating: *There can be little doubt that the Commission is not to measure (unification proposals by the standards of the antitrust laws . . . congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy.*

4. The *Railway Labor Act of 1926* (44 Stat. 577, 45 U.S.C. 151), protects railroads from prolonged work stoppages. Since World War II, there have been only five nation-wide railroad strikes with a total of 10 lost work days.

5. Unlike other industries, if railroads and airlines file for bankruptcy, their financed rolling stock returns to the creditors. *The filing of a security interest in railroad rolling stock with the ICC pursuant to 49 USC 11303 creates a right for a creditor holding that interest to take possession of such rolling stock upon default, notwithstanding that the carrier has entered bankruptcy proceedings.* (U.S. Code, Title II, USCA, Section No. 1168.)

6. At various times throughout their history, railroads have received public subsidies. The UP interlines with a number of such railroads.

7. The railroad industry is virtually the only industry in the United States to come under the *Federal Employee's Liability Act* (FELA), enacted in 1908. Seamen come under the Jones Act, which incorporates FELA provisions: The federal government enacted no-fault compensation for its employees in 1916, and for longshoremen and harbor workers in 1927 under the Longshoremen's and Harbor Workers' Compensation Act. The 50 states have no-fault compensation for all other employees.

8. The *Railroad Unemployment Insurance Act* was enacted in 1938. Non-railroad workers are covered by state programs which are part of a federal-state system.

9. Rather than being part of the nation's Social Security system, railroad employees are covered by the *Railroad Retirement Act* of 1934.

10. The *National Transportation Policy* was initially stated as the preamble to the *Transportation Act of 1940,* but many other expressions of such a policy have been forthcoming from Congress and the U.S. Department of Transportation since that time.

11. *Federal-Aid Highway Act of 1973,* Public Law 93-87; 87 STAT. 250. 1973.

12. U.S. Department of Transportation, Federal Highway Administration. *Railroad-Highway Grade Crossing Handbook.* August 1978, p. 68.

13. Association of American Railroads. *Analysis of Class 1 Railroad 1998.* p. 96.

14. U.S. Department of Transportation. Federal Railroad Administration. *Railroad Safety Statistics, Annual Report 1997.* Table 9-1.

15. *Analysis 1998, op. cit.,* p. 95.

16. Based on an average train weight of 5,400 tons and an average automobile weight of 1.8 tons.

17. The author of this report is familiar with the STB's analysis in this area because he was the chairman of a quality-control committee which oversaw the preparation of the Board's *Draft Environmental Impact Statement* regarding the UP acquisition of the SP.

18. *Staggers Rail Act of 1980,* Public Law 96-448, 96th Congress, 49 USC 10101, October 14, 1980.

19. Other railroad legislation included the *Rail Passenger Service Act of 1970* (creating Amtrak and freeing railroads from huge passenger-service losses), the *Regional Railroad Reorganization Act of 1973* (aiding and reorganizing financially depressed railroads), and the *Railroad Revitalization and Regulatory Reform Act of 1976* (liberalizing economic regulation).

20. *Staggers Rail Act: op. cit.,* Section 2, "Findings," (6).

21. Data on the plight of railroads include Congressional hearings, reports by the Association of American Railroads, studies by federal government agencies, and a host of research papers published in such journals as the *Transportation Research Forum Proceedings.*

22. Conrail was formed out of the *Regional Rail Reorganization Act of 1973* and created by an act of Congress in 1976.

23. *Staggers Rail Act, op. cit.,* Section 2.

24. *Analysis of Class I railroads, op cit.,* 1978, 1979, 1980.

25. *Ibid.,* 1980.

26. *Ibid.*

27. *Ibid.,* Line 743, p. 162.

28. The year 1996 is used instead of 1997 or 1998 because the latter two years include temporal operating expenses caused by the problems associated with UP's acquisition if the SP.

29. *Analysis of Class I Railroads, op cit.,* 1996. Line 743, p. 91.

30. Railroad inflation is measured by the *Railroad Cost Recovery Index,* (RCR) calculated and published quarterly by the Association of American Railroads. In 1980 the RCR was 140.1 as compared with 263.0 in 1996. 267.1 in 1997 and 270.9 in 1998. The 88% increase in railroad inflation between 1980 and 1996 is derived at by divided the 263.0 index figure in 1996 by the 140.1 figure in 1980. See Association of American Railroads. *Railroad Ten-Year Trends 1980-1989* p. 74 and *1988-1997,* p. 70.

31. *Analysis of Class I Railroads, op. cit,* 1966, page 95.

32. Based on data published in the annual *Analysis of Class Railroads,* the following UP employment changes were calculated:

    a. 1980 - 1982: From 27,467 employees to 22,167 employees – a 5,300 reduction.

    b. 1982 - 1988: From 42,856 employees (UP: 22,167, MP: 18,321, WP: 2,368) to 32,636 employees – a 10,220 reduction.

c. 1988 - 1994: From 33,969 employees (UP: 32,636, MKT 1,333) to 28,946 employees – a 5,023 reduction.

d. 1994 - 1996: From 35,075 employees (UP: 28,946, CNW: 6,129) to 35,272 employees – a 197 increase.

e. 1996 - 1998: From 53,647 employees (UP: 35,272, SP: 18,375) to 53,346 employees – a 301 reduction.

33. *Analysis of Class I Railroads, op. cit.*, 1980 and 1998.

34. The average annual wage of the UP in 1998 was $54,496. Is was estimated that fringe benefits add another 33%, or $17,984, to wages, resulting in $72,480 annual average compensation. The 33% fringe-benefit premium was adopted because it was the difference between all-railroad annual average wages and all-railroad annual average compensation, as provided by the Association of American Railroads, in *Railroad Ten-Year Trends*, for the year 1997.

35. According to Union Pacific Corporation's 1993 *Proxy Statement* to the Securities & Exchange Commission. *The results from continuing operations of the Company must produce a return on average annual stockholders' equity before accounting changes of at least 8%. An 8% ROE allows 1.5% of net income to be credited to the reserve fund. An ROE of 10% or greater allows crediting a maximum of 3% of net income to the fund ROE between 8% and 10% adds to the base 1.5% credit. .75% of net income for each .1% increase in ROE.*

36. Union Pacific Corporation, *Proxy Statements* to the Securities & Exchange Commission, 1993-1996.

37. *Ibid.*, 1997, p. 21.

38. The 1980 UP average compensation was calculated by adding 23.5% fringe benefits the railroad industry average) to UP's annual average salaries for "executives" of $36,626. The 1998 figure is similarly calculated by using a $68,135 reported salary figure and adding 33% in fringe benefits. Data were taken from *Analysis of Class I Railroads, op. cit.*, 1980 and 1998.

39. The GDP (Gross Domestic Product) Implicit Price Deflator increased from 60.3 in 1980 to 112.7 in 1998, equating to 87%. *Economic Report of the President*, February 1999.

40. Retention stock is an outright grant of stock which is subject to forfeiture if a UP executive terminates employment before a 3-year period elapses.

41. This goal is stated by the UP Corporation in its *Proxy Statements*.

42. Union Pacific Corporation, *Proxy Statement*, 1995, p. 22.

43. *Ibid.*, p. 23.

44. According to the UP's annual reports (R-1's) to the Interstate Commerce Commission, the railroad recorded $660 million of special charges in 1986 and $745 million in 1991.

45. *Analysis of Class I Railroads 1980, op. cit.*, p. 72.

46. Based on a 23.5% spread of fringe benefits over wages for all railroad employees, as reported by the Association of American Railroads in, *Railroad Ten-Year Trends 1988-1989*, p. 101.

47. Based on a 33% spread of fringe benefits over wages for all railroad employees, as reported by the Association of American Railroads in *Railroad Ten-Year Trends*, 1989-1998.

48. UP acquisitions since 1980 are as follows, with prices from *Moody's Transportation Manual* (New York: Moody's Investor Service), annual publications, and Union Pacific Corporation annual reports to Security & Exchange Commission.

Year	Railroad(s) Acquired	Price Paid
1980	100 miles of Milwaukee Railroad	$19 million
1982	Missouri Pacific Railroad	$1 billion
1982	Western Pacific Railroad	(both
1988	Missouri Kansas Texas Railroad	$117 million
1995	Chicago & North Western Railroad remaining 71.6%)	$1.2 billion
1996	Southern Pacific Railroad (including St. Louis Southwestern and Denver & Rio Grande railroads)	$4.1 billion ($1.6 bil. cash
1998	50-year concession for rail lines in Mexico	$525 million

49. *Analysis of Class I Railroads, op cit.*, 1980 and 1998.

50. *Ibid.*

51. *Ibid.* Also includes 1995, 1996, and 1997.

52. *Ibid.*, annual publications.

Year	ROE	Year	ROE
1980	10.7%	1985	9.5%
1981	10.31	1986	*
1982	6.2	1987	13.5
1983	6.0	1988	14.7
1984	6.5	1989	14.8

Year	ROE	Year	ROE
1990	13.3%	1995	16.7%
1991	*	1996	16.6
1992	15.4	1997	7.0
1993	11.3	1998	0.3
1994	15.1		

*significant special charges taken

53. *Ibid.*

Year	Dividends	Year	Dividends
1981	$73 Mil.	1986	$140 Mil.
1982	77	1987	190
1983	82	1988	204
1984	82	1989	234
1985	73	1990	236

Year	Dividends	Year	Dividends
1991	$240 Mil.	1996	$1,971
1992	270	1997	449
1993	290	1998	320
1994	294		
1995	331		

54. *Ibid.*, 1980 and 1988.

55. *Ibid.*

56. *Railroad Safety statistics, op. cit.*, 1997, Table 9-3.

57. UP (including its acquired railroads) maintenance expenses at grade crossings are reported in Schedule 410. *Railway Operating Expenses,* of railroad annual reports filed with the Interstate Commerce Commission from 1980-1995 and the Surface Transportation Board since 1996.

58. *Ibid.*

59. *Railroad Safety Statistics, op. cit.*, Table 1-13.

60. *Ibid.*, Table 7-9.

61. U.S. Department of Transportation, *Railroad-Highway Grade Cross Handbooks*, 1986, 2nd edition. p. 104.

62. *Ibid.*

63. Union Pacific Corporation, *Annual Report* (to shareholders), 1995, p. 1.

64. *Ibid.*, 1997.

65. *Ibid.*

66. *Analysis of Class I Railroads 1996, op. cit.*

67. Union Pacific Corporation, *Annual Report* (to shareholders), 1996, p. 34.

68. *Ibid.*, p. 37.

Attachment No. 1

QUALIFICATIONS OF DR. HARVEY A. LEVINE

Dr. Harvey A. Levine was born in 1939 and raised in Pittsburgh, Pennsylvania. The second oldest of four children and the son of a newspaper circulation manager, he attended the University of Pittsburgh on a Senatorial Scholarship, earning a Bachelor of Business Administration degree with a major in transportation economics in 1961. His practical experience in the transportation field began in 1959 as a summer employee in the traffic department of Westinghouse Electric Corporation, auditing railroad and motor carrier freight bills. In the summer of 1960, he accepted a similar position with Charles Donoley & Associates, a local transportation auditing firm.

In 1961, Dr Levine was awarded to graduate fellowship at Duquesne University where in 1963 he completed his course work for the degree of Master of Business Administration. He then accepted a management internship with the Atomic Energy Commission and was assigned to the Pittsburgh Naval Reactor Office, Department of Core Procurement where he became a contract administrator. He graduated from Duquesne in 1964 after completing a dissertation on railroad rate-making practices.

In 1965, Dr. Levine began his transportation career by joining the New York Central Railroad as a Market Research Analyst and was thereafter promoted to Assistant Director of Pricing Research. In 1967 he took a leave of absence from the railroad to become the Fletcher Fellow in Transportation at the American University in Washington, D.C. and began his studies for a Ph.D. in transportation economics. While a graduate fellow at the university, aside from teaching duties, he consulted to: (1) the Office of High Speed Transportation. U.S. Department of Transportation, where he aided in the design, collection and analysis of rail passenger data in the Northeast Corridor, (2) EBS Management Consultants, where he participated in a study to extend the Alaskan Railroad, directed a analysis of the physical distribution system of the ITT Corporation, studied the freight potential of the Port of Providence, helped design a transportation plan for the Southeastern Virginia Regional Planning Commission, and assisted in preparing economic testimony before the Interstate Commerce Commission, (3) Air Priority Dispatch, Inc., where he helped develop a business plan for air cargo service, and (4) the Common Carrier

Conference of the American Trucking Associations, Inc., and the Rocky Mountain Motor Freight Bureau, where he provided general economic consultation.

In 1968, Dr. Levine became the Deputy Director of Transportation and Urban Affairs, for the Planning Research Corporation, McLean, Virginia, thereby terminating his leave from the New York Central Railroad. Studies he directed and participated in included: estimating housing needs for the Department of Housing and Urban Development, evaluating the impacts on small towns from programs developed by the Economic Development Administration, developing an urban planning model for regional development agencies, and projecting air cargo traffic and equipment requirements for the Federal Aviation Agency.

Dr. Levine joined the U.S. Department of Transportation as the Senior Economist in the Office of the Secretary in 1970. Aside from his transportation research. Dr. Levine served as the Department's representative to the Federal Price Commission created by President Nixon, and continued his part-time college teaching, adding a course at Howard University. In 1972, he completed his dissertation on the revenue-adequate standards for Motor carriers and received a Ph.D. in business Administration, with an emphasis on transportation economics. Dr. Levine then transferred to the Interstate Commerce Commission to become Chief, Special Projects Branch, Bureau of Economics. He oversaw two major projects: the investigation of the railroad rate structure and the development of the railroad rate base and rate-of-return measures. He continued to teach courses at the American and Howard universities.

In 1973, Dr. Levine became a Senior Associate with R. L. Banks & Associates, Inc. – a Washington, D.C. transportation consulting firm, and was later promoted to Vice President. At R. L. Banks, among other studies, Dr. Levine conducted research for D.C. Transit Systems, the Southeastern Pennsylvania Transit Authority, the Grand Trunk Western Railroad, the Untied States Railway Association, a major motor carrier, the U.S. Department of Transportation, and the National Transportation Policy Study Commission. Based on his efforts for the Study Commission, he published his first book entitled. *National Transportation Policy: A Study of Studies*, in 1978. Between 1973 and 1976. Dr. Levine continued to teach business courses at Howard University and in 1976, developed a course in transportation economics which he taught to lawyers from the Office of Proceedings, Interstate Commerce Commission. During his six years with R. L. Banks, Dr. Levine testified before the Interstate Commerce Commission, the Railroad Commission of Texas, and the Washington Area Metropolitan Transit Commission.

In 1979, Dr. Levine became the Vice President, Economics & Finance Department, Association of American Railroads (AAR), where for the next 18 years he directed a staff of up to 42 economists, accountants, auditors, statisticians, financial analysts, and data processors. He co-authored a second book entitled, *Small Railroads*, published in 1982 and became Chairman of the Pension Board, Administrative Office to the Railroad Treasury Division, Administrative Officer to the Railroad Accounting Division, Chairman of the AAR Training Committee, Chief Economist to the Railroad Tax Policy Committee, railroad representative on the National Transportation

Stakeholders' Group, a member of the AAR Policy Committee, a member of the Education Board of the ENO Foundation (a transportation research center), and the railroads' representative on a research-exchange mission to the Soviet Union, accompanying the Federal Railroad Administrator. Based on that trip, he published a treatise entitled, *The USSR, and its Railroad System.*

At the AAR, Dr. Levine taught courses in railroad economics, policy and finance, and diversity training to AAR staff, gave numerous presentations, met with many foreign railroad dignitaries, developed and maintained statistical data bases, and authored countless papers and reports. Furthermore, he provided written testimony to the Interstate Commerce Commission, Surface Transportation Board. Presidential Emergency Board, the California State Equalization Board, and a District Court in Texas. He gave depositions to the latter two entities.

Dr. Levine's department at the AAR served as the central agency of the railroad industry for the collection, processing, distribution and analysis of economic and financial data. In addition, the department assisted the railroad industry in conducting research in support of policy positions by managing a regulatory-cost center, conducting a host of tasks affiliated with interline service, and representing the industry in regulatory proceedings. In his capacity as Chief Economist of the railroad industry, Dr. Levine represented railroads in among other areas, general rate proceedings, the Rail Cost Adjustment Factor, productivity, revenue adequacy, labor economics, the cost of capital, and credit terms. He designed and developed the railroad inflation index used by railroads

for permissive rate increase and contract-rate adjustments. Furthermore, he initiated three of the Association's major data bases and publications: *Analysis of Class I Railroads, Ten-Year Trends,* and *Profiles of Railroads in the United States* (a personal computer data base of all 500-plus freight railroads in this country).

After voluntarily taking an early retirement from the AAR in early 1997, Dr. Levine began his own consulting practice. Aside from conducting research for the AAR in 1997, 1998 and the first part of 1999, Dr. Levine has served clients such as: DeLeuw Cather & Associates (Parsons Transportation), where he was chairman of a quality control committee overseeing the environmental impact analysis associated with the Union Pacific Railroad's acquisition of the Southern Pacific Railroad, and the CSX and NS railroads' acquisition of Conrail; R. L. Banks & Associates, Inc.; and the Dakota Eastern & Minnesota Railroad.

While always aware of railroad safety issues and involved in safety statistics at the ARR, Dr. Levine became keenly interested in the subject of grade-crossing safety while conducting research on the Randolph Road crossing in his resident town of Rockville, Maryland.

REDUCTION OF MAINTENANCE-OF-WAY EMPLOYEES[1] AND SAVINGS OF COMPENSATION: UNION PACIFIC RAILROAD

Year	Number of Employees	Annual Change in Employment	Cumulative Reduction in Employment	Average[2] Annual Compensation	Annual Savings of Compensation
1980	5,316			$24,300	
1981	5,244	- 72	72	26,326	$ 1,895,472
1982	4,169	- 1,075	1,147	30,579	30,195,922
1983	4,257	- 88	1,059	33,167	35,123,853
1984	4,308	- 51	1,008	36,188	36,477,504
1985	4,080	- 228	1,236	35,817	44,269,812
1985	9,104[3]				
1986	7,235	- 1,869	3,105	40,614	126,106,470
1987	6,397	- 838	3,943	42,983	169,481,969
1988	6,618	- 221	3,722	43,208	160,820,176
1988	6,898[4]				
1989	7,012	- 114	3,608	42,704	154,076,032
1990	7,012	0	3,608	44,486	160,505,488
1991	6,948	- 64	3,672	48,419	177,794,568
1992	6,771	- 177	3,849	47,985	184,694,265
1993	6,589	- 182	4,031	48,652	200,147,212
1994	6,528	- 61	4,092	49,153	201,134,076
1994	8,012[5]				
1995	7,935	- 77	4,169	51,987	216,733,803
1996	8,194	- 259	3,910	56,020	219,038,200
1996	11,628[6]				
1997	12,115	- 487	3,423	56,635	193,861,605
1998	11,346	- 769	4,192	58,181	243,894,752
Totals		**4,192 Terminated Employees**			$2,556,151,179 **= $2.6 Billion**

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[1] "Maintenance of Way and Structures," as reported by the Association of American Railroads in the annual publications of Analysis of Class I Railroads.

[2] Ibid. for wages. Fringes added to wages based on ratio of total compensation to wages for all Class I Railroads as reported by the Association of American Railroads in Ten-Year Trends.

[3] Year prior to consolidated reporting of acquired railroads: (MP and WP: 4,080 and 596 employees).

[4] Year prior to consolidated reporting of acquired railroad (MKT: 280 employees).

[5] Year prior to consolidated reporting of acquired railroad (C&NW: 1,484 employees).

[6] Year prior to consolidated reporting of acquired railroad (SP: 3,434 employees).

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APPENDIX 10

EXHIBIT 22

THE
BNSF RAILROAD
AND
GRADE-CROSSING SAFETY

Report By:

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October 1999

EL6 This report addresses the question as to whether the economic practices and policies of the Burlington Northern Santa Fe Railroad (BNSF)[1] have adversely affected the level of safety at its grade crossings. Based on an analysis of empirical evidence since 1980, and the author's knowledge of national transportation policy and railroad economics, the report concludes that:

1. The Staggers Rail Act of 1980 gave freight railroads industry the financial opportunity to provide adequate and safe service.

2. Since BNSF's financial performance was substantially above the average railroad when the Staggers Rail Act was enacted, its financial opportunity was extraordinary.

3. BNSF proceeded to engage in massive cost cutting led by draconian downsizing of its labor force, resulting in the savings of tens of billions of dollars.

4. BNSF's emphasis on cost cutting in order to maximize profits, was directed by its executives, who had financial incentives to do so, and who were richly rewarded for their efforts.

5. The cost cutting and profit maximization were extended to BNSF grade crossings as many maintenance-of-way employees were terminated, and in that the railroad refused to accept responsibility for determining the need for, and funding of, safety devices.

6. Instead, BNSF inappropriately relied on a limited public program for the determination and funding of safety devices at its grade crossings.

7. BNSF's reliance on the government conflicts with the logic of shared existence, its public responsibility, and judicial findings.

8. Furthermore, BNSF could well have afforded to install the safest of all devices – automated gates – at all of its 17,000 passive grade crossings.

9. From a societal perspective, the benefits of such installations would have outweighed the costs.

10. Safety consciousness at BNSF grade crossings is compromised by that railroad's economic policies.

11. Adverse impacts from BNSF's policies and procedures toward grade-crossing safety would most likely be experienced at its non-gated crossings.

12. Thus, in the case of its grade crossings, BNSF chose short-run economic gains over the savings of lives, and the lessening of personal injury and property damage.

1. THE STAGGERS RAIL ACT OF 1980 GAVE FREIGHT RAILROADS THE FINANCIAL OPPORTUNITY TO PROVIDE ADEQUATE AND SAFE SERVICE.

The Staggers Rail Act of 1980 (Staggers)[2] deregulated much of the railroad industry's economic behavior and culminated a decade of favorable railroad legislation.[3] The Act (Section 6) recognized that railroad earnings were *insufficient to generate funds for necessary capital improvements,* somewhat excusing the industry for past investment shortfalls, but indicating that the anticipated turnaround would require railroads to fulfill their economic and social obligations.

The *Rail Transportation Policy* section of Staggers identified expected benefits of railroad deregulation which would accrue to four parties: (1) Shippers were to receive reasonable rates, sound transportation, and the avoidance of undue concentration of market power. (2) Investors were to realize adequate returns. (3) Employees were to receive *fair wages and safe and suitable working conditions, and (4)* The public was to enjoy a rail transportation system *without detriment to the public health and safety* (emphasis added by author).

The relationship between a railroad's financial posture and the level of safety it provides is patently obvious and has long been recognized in transportation circles. During the general decline of the railroad industry in the decades preceding Staggers, numerous studies cited the danger of deferred maintenance being accumulated by railroads. Two such major efforts were: (1) the *Doyle Report* of 1961,[4] a comprehensive Congressional study

which called for the need of railroad regulatory reform, and (2) the railroads' ASTRO report in 1970, which stressed that improved earnings were needed to eliminate inadequate capital investment, and concluding that it was in the public interest to have financially-healthy railroads.[5] Similarly, Section 3 of Staggers stated that: *The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States.* Clearly, one of the societal expectations of financially-sound railroads was that they would make adequate expenditures and capital investment in order to provide safe operations and facilities for those who use and are affected by their operations.

2. SINCE BNSF'S FINANCIAL PERFORMANCE WAS SUBSTANTIALLY ABOVE THE AVERAGE RAILROAD WHEN THE STAGGERS RAIL ACT WAS ENACTED, ITS FINANCIAL OPPORTUNITY WAS EXTRAORDINARY.

With much of the railroad industry in the financial doldrums during the 1970's, it was not surprising that Staggers (Section 2) stated that railroad earnings were *the lowest of any transportation mode and . . . insufficient to generate funds for necessary capital improvements,* and that without the legislation railroads would experience a capital shortfall of $16-$20 billion by 1985. However, BNSF was an exception to the overall dismal financial performance of the railroad industry. As shown below. BNSF enjoyed rates of return on equity (ROE) – that is rates of profit to shareholders after all operating expenses, interest payments, and taxes are paid – which were 86%

greater than the railroad industry as a whole during the 1978-1980 period.[6]

Year	Rate of Return on Equity: All Railroads	Rate of Return on Equity: BNSF[7]	Percentage BNSF Greater Than Industry
1978	1.3%	5.9%	354%
1979	5.4	8.5	57
1980	6.0	9.0	50
Three-year Average	4.2%	7.8%	86%

Furthermore, in 1980 BNSF ranked first in the railroad industry in terms of traffic (ton-miles). first in miles of road operated, second in freight revenue, second in net railroad operating income, second in ordinary income, and second in net investment.[8] Clearly, at the time that Staggers was enacted, the BNSF was one of the country's largest and most profitable railroads. Thus, BNSF was given an extraordinary opportunity to further increase its earnings and fulfill its responsibilities, including that of providing safe grade crossings.

3. YET, BNSF PROCEEDED TO ENGAGE IN MASSIVE COST CUTTING LED BY DRACONIAN DOWNSIZING OF ITS LABOR FORCE, RESULTING IN THE SAVINGS OF TENS OF BILLIONS OF DOLLARS.

Despite its relative financial strength, BNSF reacted to its newly-found economic freedom under Staggers to massively slash costs. In 1980, BNSF's cost of producing a ton-mile of traffic was 1.74 cents,[9] while in 1998 the figure dropped to 1.45 cents,[10] equating to a 0.29 cent reduction and 17% decline in operating costs over the 18 years.

Even more startling is that the 17% cost reduction was made in the face of a 93% increase in railroad inflation.[11] Consequently, the 1.45-cent cost in 1998 is equivalent to 0.75 cents in 1980 dollars (inflation index of 100/193 x 1.45 cents), so that in inflation-adjusted terms, BNSF's cost savings in 1998 compared with 1980 is .99 cents (1.74 cents minus 0.75 cents), amounting to a **57% reduction in operating costs.**

Table No. 1 identifies the annual and cumulative levels of operating expenses that BNSF avoided by cutting costs since 1980. While this table appears to be a complex statistical presentation, its constructions is relatively straight forward. Column 1 lists BNSF's annual annual [sic] operating expense per unit of traffic (ton-miles) provided. Column 2 identifies the railroad inflation rate, in order to convert the expenses in Column 1 to inflation-adjusted (constant) dollars. Column 3 performs this task by dividing Column 1 by Column 2. Column 4 is a calculation of BNSF's annual expense savings, resulting from subtracting Column 3 from the 1.74 cent cost in 1980, shown in Column 1. Column 5 identifies the annual ton-miles of traffic produced by BNSF. And Column 6 presents the total annual savings by multiplying the ton-miles in Column 5 by the savings per ton-mile in Column 4. The overall result is a total savings of about $30 billion from 1980 through 1998. Since some of the savings resulted from economies associated with increased traffic volumes, the savings from cost cutting is actually less than $30 billion, but is certainly the majority of the total amount. For purposes of this paper, it is sufficient to conclude that **BNSF's cost cutting since deregulation in 1980 probably saved the railroad tens of billions of dollars in operating expenses.**

Table No. 1

RESULTS OF BNSF COST CUTTING SINCE 1980

Year	1/ Freight Expense Per Revenue Ton-Mile (Cents)	2/ Railroad Inflation Index	3/ Inflation-Adjusted Expense Per Revenue Ton-Mile (Cents)	4/ Inflation-Adjusted Savings Per Revenue Ton-Mile (Cents)	5/ Revenue Ton-Miles (Billions)	6/ Total Annual Savings ($Millions)
1980	1.74 cts	100.0	1.74 cts	-	155.6	-
1981	2.17	112.5	1.93	(0.19 cts)	156.6	($298)
1982	2.21	120.1	1.84	(0.10)	157.7	(158)
1983	1.90	125.3	1.52	0.22	172.3	379
1984	1.72	129.7	1.33	0.41	200.6	823
1985	1.75	131.3	1.33	0.41	184.0	754
1986	1.70 7/	132.3	1.28	0.46	187.2	861
1987	1.65	136.5	1.21	0.53	206.3	1,093
1988	1.70	143.7	1.18	0.56	223.5	1,252
1989	1.68	150.0	1.12	0.62	232.5	1,442
1990	1.72	157.5	1.09	0.65	234.3	1,523
1991	1.72 8/	161.3	1.07	0.67	232.4	1,557
1992	1.72	168.7	1.01	0.73	230.8	1,685
1993	1.69	170.0	0.99	0.75	237.3	1,780
1994	1.58	172.5	0.92	0.82	260.6	2,137
1995	1.58 9/	180.5	0.88	0.86	293.4	2,523
1996	1.58	187.7	0.85	0.89	411.1	3,659
1997	1.55 10/	190.6	0.81	0.95	424.6	4,034
1998	1.45	193.4	0.75	0.99	469.0	4,643
Total Cost Avoidance						**$29,689**

Rounded to $30 Billion

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Table No. 1 – Continued

[1/]
Association of American Railroads. *Analysis of Class I Railroads,* annual publications.

[2/]
Railroad Cost Recovery Index published quarterly by the Association of American Railroads, and available in its annual publication. *Railroad Ten-Year Trends.*

[3/]
Column 1 divided by column 2.

[4/]
Column 3 subtracted from 1.74 cents, the 1980 freight expense per ton-mile (Column 1. 1980 figure).

[5/]
Analysis, op. cit.

[6/]
Column 4 multiplied by column 5.

[7/]
Midpoint between 1985 and 1987 figures due to $352 million of special charges included in 1986 reported operating expenses. Special charges from BNSF annual report (R-1) to Interstate Commerce Commission.

[8/]
Midpoint between 1990 and 1992 figures due to $708 million of special charges included in 1991 reported operating expenses. Special charges from BNSF annual report (R-1) to Interstate Commerce Commission.

[9/]
Midpoint between 1994 and 1996 figures due to $671 million of special charges included in 1995 reported operating expenses. Special charges from BNSF annual report (R-1) to Interstate Commerce Commission.

[10]/
Reported figure of 1.57 cents conservatively reduced to 1.55 cents due to $90 million of special charges included in 1997 operating expenses. Special charges from BNSF annual report (R-1) to Surface Transportation Board.

At the heart of the BNSF cost cutting was a significant reduction of its labor force. After adjusting employment levels for BNSF's acquisition of other railroads during the 1980s and 1990s, **BNSF employment declined by 29,592 employees from 1980 to 1998,** as shown in Table No. 2.[12] This table also reveals that 26,250 of the 29,592 reduced terminated employees, or 89%, were cut during the first seven years following Staggers.

While the size of the employment decline is itself noteworthy, what is also astonishing about these terminations is that BNSF traffic increased by over 200% during the 18-year period between 1980 and 1998.[13] If BNSF had retained the terminated employees and not hired any additional employees to handle the increases in traffic, and in 1998 provided those employees with the average annual compensation of $74,995,[14] the railroad would have incurred additional operating expenses of $2.2 billion in that single year alone. Accepting half of the $2.2 billion savings in 1998, or $1.1 billion, as the average annual savings over the 18-year period, the total BNSF savings due to employee terminations would amount to about $20 billion ($1.1 billion x 18 years). Thus, **labor reductions accounted for about two-thirds of the total $30 billion saved by BNSF since 1980.**

4. BNSF'S EMPHASIS ON COST CUTTING TO MAXIMIZE PROFITS, WAS DIRECTED BY ITS EXECUTIVES WHO HAD FINANCIAL INCENTIVES TO DO SO, AND WHO WERE RICHLY REWARDED FOR THEIR EFFORTS.

BNSF executives had major financial incentives to cut costs and maximize BNSF's profits. The incentives are detailed in BNSF's executive-compensation program. Executive pay at BNSF has two components: annual pay and long-term compensation, and a substantial portion of executive annual pay, and virtually all of long-term compensation, largely depends on the railroad's financial performance.

Annual executive compensation at BNSF is divided into what is referred to as *base salary* and *short-term incentives* – the latter commonly referred as *bonuses*. While base salary depends on the content of the position and a comparative analysis with other companies, bonuses depend on *specified goals and levels of achievement, all of which align with the enhancement of stockholder value.*[15] In regard to base salary, on average, **BNSF executive compensation increased by 197 percent from $47,217 in 1980 to $139,442 in 1998.**[16] This compares with a national inflation rate

Table No. 2

BNSF LABOR REDUCTION SINCE 1980

Year	Total Number of Employees	Change in Number of Employees
1980	56,540	
1981	52,828	- 3,712
1981*	55,347	
1982	46,015	- 9,332
1983	40,911	- 5,104
1984	39,793	- 1,118
1985	38,294	- 1,499
1986	35,110	- 3,184
1987	32,809	- 2,301
1988	32,402	- 407
1989	32,896	+ 494
1990	32,905	+ 9
1991	31,760	- 1,145
1992	31,204	- 556
1993	30,502	- 702
1994	30,711	+ 209
1995	30,671	- 40
1995**	45,556	
1996	43,731	- 1,825
1997	43,468	- 263
1998	44,352	+ 884
Total Employee Reduction		**- 29,592**

* Includes Colorado & Southern Railroad (848 employees) and Fort Worth & Denver Railroad (1,671 employees).

** Includes Santa Fe Railroad (14,985 employees).

of 87% over the 18-year period.[17] In reality, BNSF executives earned an average compensation in excess of the reported amount in 1998 because that number represented *executives, officials and staff assistants*, while in 1980, the figure was solely for *executives* – that is, there was a change in the reporting format between 1980 and 1998. Since executives earn more than officials and staff assistants, the reported 1998 executive compensation was understated as part of the broader category. Furthermore, when stock distributions are accounted for, BNSF executive compensation increases dramatically.

In regard to BNSF executive bonuses, the value can approach that of base-level salaries. For example, as shown below, in 1994 bonuses to BNSF's five highest-ranked executives averaged $344,172 compared with average base salaries of $375,102.[18] Thus, bonuses in that year equated to 92% of base salaries. Exact amounts of executive bonuses are determined annually by a compensation committee.

Executive	Base Salary	Bonus
CEO	$691,667	$790,860
EVP/Corp.	317,220	255,000
CFO	333,333	225,000
EVP/Law	272,125	225,000
EVP/Coal	259,167	225,000
Total	$1,875,512	$1,720,860
Average	$375,102	$344,172

Long-term BNSF compensation is provided in the form of stock options and restricted stock grants. According to BNSF's proxy statement to the Security & Exchange Commission (SEC). *Stock options reward and encourage*

effective leadership that contributes to the Company's long-term financial success, as measured by an appreciation in its stock price.[19] Similarly, grants of restricted stock:

> *provide long-term incentive compensation to executives in the form of Company stock, based on enhancing the Company's performance and stockholder value over an extended period. This plan is directly linked to our stockholders' interests.*[20]

Summing up their long-term executive compensation program, BNSF states that:

> *We believe all stockholders benefit when the Company is managed with a goal of maximizing the return to stockholders.* Stockholder return can only be maximized when executives are stockholders and, therefore, also conduct business in their own best self-interests.[21]

When stock grants presented to the five executives identified above are accounted for, a broader perspective of BNSF executive pay is revealed, as shown below:

Executive	Base Salary	Bonus	Stock Grants	Other	Total
CEO.	$691,667	$790,860	$783,750	$229,410	$2,495,687
EVP/Corp.	317,220	255,000	275,000		847,220
CFO	333,333	225,000	550,000		1,108,333
EVP/Law	272,125	225,000	225,500		722,625
EVP/Coal	259,167	225,000	203,500		687,667
Total	$1,873,512	$1,720,860	$2,037,750		$5,861,532
Average	$374,702	$344,172	$407,550		$1,172,306

The average executive base salary of $374,702 increases to $718,874 when bonuses are included ($374,702 plus $344,172), and to $1,172,306 when stock grants are also included. In essence, without accounting for stock-option distributions, the five highest ranking BNSF executives earned an average income of almost $1.2 million in 1994. What is particularly interesting about the above payments is that base salaries equated to only 32% of the executives' total compensation, excluding stock options. Thus, 68% of executive pay was tied to company financial performance and clearly cost cutting influenced such performance.

Aside from the $1.2 million average income, BNSF executives were (and are) also awarded stock options. In 1994, the above five executives received 130,500 shares of common stock in the form of stock options, which was worth $55 at that time, for a total value of $7.2 million, or $1.4 million per executive.[22] How much money executives earn from stock options depends on the increase in the value of the stock. In its 1995 proxy statement, BNSF showed that its stock had increased by over 77% in the preceding 5-year period. Assuming an annual increase of 15% in the value of the stock options, on average, the five executives would earn another $1.1 million annually ($7.2 million x 15%) from their 1994 stock options. This would raise the average top-five executive income in 1994 to $2.3 million ($1.2 million plus $1.1 million). And of course, other BNSF executives received bonuses, grants of stock, and stock options in 1994 and other years.

As a final indication of the magnitude of BNSF executive income, consider the cumulative shares of stock

owned by the outgoing Chairman/Chief Executive Officer of BNSF in 1995. As of March 10, 1995, he owned 1,043,838 shares of the company's stock.[23] While the stock price reached into the 80's during 1995, even at a price of say $70 per share, BNSF's Chairman would have owned over $73 million worth of stock. This represented about 1.2% of the total shares (and value) of BNSF stock; the highest ranking five BNSF executives owned 2.5% of the company's stock.[24]

What helped executives obtain rewards from cost cutting was a provision in Staggers which allowed railroads to freely make quarterly price increases up to the levels of the industry's rate of inflation.[25] This escalation basis was in lieu of rate changes tied to a unit-of-cost index – most notably, operating expense per ton-mile of traffic. Beginning in mid-1989, the Interstate Commerce Commission (ICC) required the railroad inflation index to be adjusted for productivity gains, and although still beneficial to railroads, its use as an industry-wide, tariff adjuster, dramatically declined. (The index is still used by railroads for contract-rate adjustments). Still, from 1980 to 1989, railroad inflation increased by 70%, while BNSF's operating expenses per ton-mile declined by 3%.[26] Consequently, BNSF could raise its freight rates up to 70% without ICC interference, even though it experienced a decline in operating costs. While not all BNSF freight rates increased by the allowable 70% (because of competition in some markets), rates accelerated enough to substantially increase the overall earnings of the railroad, thereby benefitting shareholders[27] and BNSF executives. Similarly, some BNSF customers benefitted from the cost cutting in the form of compressed freight rates.

Employees, other than executives, benefitted from higher compensation. And even those employees who were terminated, received some benefits in the form of substantial severance payments.

5. THE COST CUTTING AND PROFIT MAXIMIZATON [sic] WERE EXTENDED TO BNSF GRADE CROSSINGS AS MANY MAINTENANCE-OF-WAY EMPLOYEES WERE TERMINATED, AND IN THAT THE RAILROAD REFUSED TO ACCEPT RESPONSIBILITY FOR DETERMINING THE NEED FOR, AND THE FUNDING OF, SAFETY DEVICES.

Grade-crossing safety did not benefit from BNSF's massive cost cutting since the enactment of Staggers. In fact, the railroad terminated many employees who were responsible for maintaining its track structure and related facilities – the maintenance-of-way employees, classified as *Maintenance of Way and Structures.* As shown in Table No. 3, in spite of its railroad acquisitions after 1980, and a 200% increase in traffic, BNSF reduced its maintenance-of-way employment by 6,344 employees from 1980 to 1998.

From a broader perspective, there is no evidence of BNSF taking a leading posture to comprehensively evaluate its safety needs at grade-crossings, voluntarily upgrade its passive crossings to automated gated crossings, and/or adequately make a financial commitment to grade-crossing safety. To the contrary, as discussed in the following section of this report, BNSF supported the industry position that railroads were not responsible a number of significant aspects of grade-crossing safety.

Aside from BNSF's lack of voluntary capital expenditures at grade crossings, it appears that its maintenance expenses at those crossings declined by such a large amount, that the railroad's reported maintenance expenses are at best, highly questionable, and at worst, an indication as to the magnitude of BNSF cuts in its grade-crossing maintenance commitment. As shown below, the BNSF reported grade-crossing maintenance expenses of over $7 million in 1980, compared with under $2 million in 1997. On an expense-per-crossing basis, reported maintenance expenses dropped from $282 to $68 from 1980 to 1997. And when the railroad 91% inflation rate between 1980 and 1997 is accounted for, the maintenance cost per grade crossing declined by an incredible 87%.

Table No. 3

REDUCTIONS IN BNSF MAINTENANCE-OF-WAY EMPLOYEES SINCE 1980

Year	Number of Maintenance-of-Way Employees	Change in Number of Employees
1980	12,200	-
1981	11,607	- 593
1981*	13,037	
1982	10,548	- 2,489
1983	9,715	- 833
1984	9,442	- 273
1985	8,808	- 634
1986	7,940	- 868
1987	7,108	- 832
1988	6,991	- 117
1989	6,929	- 62
1990	6,923	- 6
1991	6,615	- 308
1992	6,847	+ 228
1993	6,970	+ 123
1994	7,201	+ 231
1995	7,073	- 128
1995**	10,551	
1996	10,573	+ 22
1997	10,522	- 51
1998	10,868	+ 246
Total Maintenance-of-Way Employee Reduction		**6,344**

* Includes Colorado & Southern Railroad (306 employees) and Fort Worth & Denver Railroad (531 employees).

** Includes Santa Fe Railroad (3,478 employees).

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		1980	1997
1.	BNSF maintenance expense at grade crossings	$7,244.000	$1,677,000[28]
2.	Number of crossings	25,714	24,764[29]
3.	Maintenance expense/ crossing	$282	$68
4.	Inflation-adjusted maintenance/crossing	$282	$36

6. INSTEAD, BNSF INAPPROPRIATELY RELIED ON A LIMITED PUBLIC PROGRAM FOR SUCH SAFETY-NEED DETERMINATIONS AND FUNDING.

Historically, the responsibility for grade-crossing safety was originally that of railroads, but as highways and motor traffic increased, railroads began to share the responsibility with highway administrators. The Federal-Aid Road Act of 1916 initially provided federal funds for eliminating hazards at grade crossings and since that time, public monies have continued to be available through a variety of legislation. In 1970, the Federal Rail Safety Act declared that among other things, *laws, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable.*[30] This legislation was followed by the Highway Safety Act of 1973, which required the states, in order to acquire federal funds for grade-crossing improvements, *conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices and implement a schedule of projects for this purpose.*[31] Furthermore, the federally-funded changes (improvements) to be made at grade crossings were to be

in compliance with the *Manual on Uniform Traffic Control Devices* (MUTCD)[32] – a *compendium of uniform standards for design and use of traffic control devices by public authorities and officials having jurisdiction over traffic operations.*[33] As part of the railroad industry's position on grade-crossing, safety responsibility, 1970 and 1973 legislation collectively were cited as evidence that the federal government preempted state laws affecting railroad safety at grade crossings. In essence, in BNSF's mind, if the federal government was responsible for determining the safety needs at all grade-crossing, BNSF would be free from that and related aspects of grade-crossing safety. However, the combination of federal funding for grade-crossing safety and the establishment of filtering federal monies through the states with the goal of uniformity of grade-crossing safety devices, did not absolve the railroad of its responsibility for safe grade crossings, for the following reasons.

1. Like many other federal-aide programs, the funding for grade-crossing safety was never designed to put the federal government in total control of the activity it was helping to fund. The federal criteria established to receive federal funds for grade-crossing improvements should not be confused with judgments about the adequacy of safety levels at all grade crossings in the United States.

2. The federal aid to grade-crossing safety beginning in 1973, was little more than an extension of a program which had existed for many years, and nothing in any legislation – including the 1973 Act – concluded that grade-crossing safety was to be an exclusive public responsibility.

3. The level of federal funds for grade-crossing safety has been limited and their distribution has been based on criteria other than safety needs. This is because 50% of the funding is distributed to states based on the number of crossings in each state, 25% is based on the population of urban areas, and 25% on general measures, evenly divided among size of area, population of rural areas, and rural delivery and intercity mail route mileage); 0.5% of federal monies is the minimum allocated to any state.[34]

4. Filtering federal money through the states does not in itself constitute a federal grade-crossing standard; it is simply a way to distribute the money.

5. There is no consistency among the states as to how they determine which grade-crossings projects to undertake and fund. In fact, some states do not use all of their allotted grade-crossing funds for grade-crossing improvements, and

6. Grade-crossings moneys generally meet the exceptions of the Highway Safety Act (see above). By their very nature, grade crossings are local in character and both railroad and publicly-sponsored improvements in grade-crossing safety can easily conform to federal rules and not create an under burden on interstate transportation.

The author of this paper is a long-time student of national transportation policy and in 1982 published a book on the subject.[35] He has continued to review national transportation policy statements, federal transportation legislation, and related studies since 1982 and finds no public authority excusing the railroads from their responsibility to provide safe grade crossings.

7. BNSF'S RELIANCE ON THE GOVERNMENT CONFLICTS WITH THE LOGIC OF SHARED EXISTENCE, ITS PUBLIC RESPONSIBILITY, AND JUDICIAL FINDINGS.

Aside from the fact that the Federal Rail Safety Act of 1970, the Highway Safety Act of 1973, and/or the MUTCD do not release BNSF from its grade-crossing safety responsibility, there are a number of reasons why the BNSF is responsible for safety at its grade crossings. As discussed below: (1) It is simply logical for two or more parties which share a facility, service, and/or location, to also share the responsibility for safety. (2) BNSF has been vested with a *public nature* and thus, a responsibility to the public which licensed it, subsidized it, and to which it serves, and (3) Many judicial findings, including a recent one by the U.S. Supreme Court, have upheld the notion that railroads are responsible for determining safety needs at grade crossings.

Logic of Shared Existence

It is patently logical to conclude that when two modes of transportation intersect each other, those modes have a shared responsibility for safety at those intersections (crossings). After all, if it were not for either of the modes, there would be no crossings and thus, no related accidents. BNSF is the country's largest railroad, ranking 1st in traffic handled, 2nd in miles of road operated. 1st in freight revenue, and 1st in income.[36] With trains outweighing automobiles by a 3,000-to-1 ratio[37] and allegedly taking a mile or so to stop, it is incumbent upon BNSF to provide adequate safety to those crossing its

publicly-vested track structure. When one considers that BNSF is the only entity passing through its many grade crossings on a daily basis, it becomes clear that BNSF has a major role in providing and maintaining reasonably safe grade crossings.

Public Responsibility

Unlike most other companies in the United States, BNSF has an inherent *public nature*.[38] While privately owned, BNSF was birthed and developed in the mid-1800s with massive public aide.[39] Then in 1887, the federal government regulated railroads in a manner different than other industries and has continued to treat railroads as a rather unique industry. Railroads are immune from antitrust laws affecting other industries. They benefit from special anti-strike legislation.[40] bankruptcy provisions[41] and public-assistance.[42] Railroad employees fall under their own workers' compensation, unemployment insurance, and retirement systems, rather than being under state programs and federal social security. And the country's *National Transportation policy*[43] and other transportation legislation reflects the public nature of railroads. It is little wonder that railroad reporting to the ICC, and now the Surface Transportation Board (STB), provides the public with a plethora of detailed railroad financial and operational information.

The public nature of BNSF is not a one-way street as it has obligations to the public which licensed and is affected by it. From an economic viewpoint, BNSF has a common-carrier obligation and must provide joint rates,

through routes, non-discriminatory service and reasonable rates. To society, it must provide safe facilities and operations, notwithstanding federal assistance. In fact, five years after the initiation of federal assistance for grade-crossing facilities,[44] the Federal Highway Administration (FHA) affirmed that railroads have responsibility for improving grade-crossing safety. More specifically, in **1978 the FHA stated that:** ***It may be expected that as the financial condition of an individual railroad deteriorates or improves, the company's commitment to grade crossing improvement financing will change.***[45]

Judicial Findings

The liability of railroads in grade-crossing accidents has been documented in judicial verdicts, settlements and opinions. Railroad responsibility can range from a low percentage of total liability to 100% of the amount. For example, a railroad was sued by its conductor and found to be 10% at fault in a collision because there was insufficient room for a stopped semitrailer between the railroads tracks and the crossing highway.[46] In another case, a jury found a railroad to be 42% responsible because the railroad failed to install automatic gates and replace 8-inch flashing lights with 12-inch flashing lights at the crossing.[47] Similarly, a railroad was found to be 50% responsible for an accident in which it did not instruct its engineers to slow the engine before the crossing, and had removed a flagman at the crossing who had previously been there.[48] And a railroad was held to be 100% liable in case where a *ultrahazardous* crossing lacked active warning devices.[49]

A number of judicial decisions have held that railroads have a common law duty to maintain safe grade crossings.[50] For example, as one court stated: . . . *there is no case law or legislative history to support the theory that Congress intended to completely occupy the field of railroad safety governance.*[51] Furthermore, the Supreme Court ruled in the *Easterwood Case* that just because MUTCD must be complied with as a component of federal funding of grade crossings, does not exclude railroads from adhering to state laws governing their responsibility for grade-crossing safety: more specifically, the Court stated that:

> *Preemption is not established by 23 CRF 646.214 (b)(1)'s requirement that the States comply with the Manual on Uniform traffic Control Devices for Streets and Highways and by the Manual's declaration that the States determine the need for, and type of, safety devices to be installed at a grade crossing.*[52]

In essence, MUTCD provides for uniformity in the design of safety devices at grade crossings in respect of federal funding, but such minimum standards do not preclude railroads from fulfilling their responsibilities at grade crossings, including compliance with state laws.

8. FURTHERMORE, BNSF COULD WELL HAVE AFFORDED TO INSTALL THE SAFEST OF ALL DEVICES – AUTOMATED GATES – AT ALL OF ITS 17,000 PASSIVE GRADE CROSSINGS.

It is estimated that the net (after tax) cost to BNSF of installing signals and gates at its 17,000 passive grade crossings over the 25-year expected life of those facilities, would approximate $275 million, or $11 million (rounded

upward) annually. The calculations presented below are based on:

17,000 passive grade crossings
x $100 thousand (installation cost per crossing)[53]
= $1.7 billion (total cost)
/ 25 years (life of signals and gates)
= $68 million (annual cost)
x 41.5% (BNSF share of cost)
= $28 million (initial BNSF annual cost)
x 60% (BNSF % not passed on to customers)
= $17 million (BNSF pre-tax annual cost)
x 63% (non BNSF income-tax deduction portion)
= $11 million (BNSF net annual cost)

(1) an average installation cost of $100,000 per signal and gate set, (2) a 25-year facility life for accounting purposes, (3) BNSF paying 41.5% of the installation costs, representing the midpoint between 33% and 50% – sound arguments can be made for either number – (4) BNSF's ability to pass on 40% of the installation costs to its customers where demand is relatively less competitive, and (5) a BNSF combined state-and-federal income tax rate of 37%.

By any reasonable standard, BNSF could well have afforded to fund the installation of signals and gates at its passive grade crossings. An $11 million annual expenditure pales in comparison with the tens of billions of dollars of BNSF cost reductions and inflation avoidance since deregulation, its $1.4 billion of net railroad operating income and $1.2 billion of net income in 1998,[54] and the $3.3 billion it paid to purchase the Santa Fe Railroad

in 1995. Furthermore, the $11 million is less than the annual bonuses given to BNSF executives.

Even if the $11 million were paid out of dividends, there would be no meaningful effect on investors. For example, in 1998 the BNSF's $1.44 dividend 55 would have been reduced by 7 cents (1-2 cents per quarter) to $1.37 thereby generating $11 million from the 157 million shares of common stock. Furthermore, the BNSF dividend increased by 20% in 1998 from 1.20 in 1997 to $1.44 in 1998. The $24 million in increased dividend payouts was enough to pay for more than two years of BNSF gate installations. And finally, as shown below, an annual BNSF payment of $11 million equates to: (1) $60 for a family with an annual income of $50,000; (2) $280 to a family with a net worth of $200,000, and (3) $1,162 to a family with a combined balance of $10,000 in its savings and checking accounts.

	BNSF		
Operating Revenue:	$8.9 Billion	x .0012	= $11 Million
Shareholders' Equity:	$7.6 Billion	x .0014	= $11 Million
Cash on Hand:	$94.7 Million	x .1162	= $11 Million

A Hypothetical Family

Annual Earnings:	$50,000	x .0012	= $60
Net Worth:	$200,000	x .0014	= $280
Savings/ Checking Accounts:	$10,000	x .1162	= $1,162

In essence, no matter what means of financial analysis or comparison is applied, it is clear that BNSF could well have afforded to have taken a pro-active position regarding grade-crossing safety, and could have significantly improved safety at those crossings. It is no wonder that in its 1998 annual report, BNSF chairman Rob Krebs told his stockholders: ***No matter what measure is used, 1998 was a record-breaking year for BNSF."***

9. FROM A SOCIETAL PERSPECTIVE, THE BENEFITS OF SUCH INSTALLATIONS WOULD HAVE OUTWEIGHED THE COSTS.

Over the past five years of accident data (1993-1997) reported to the Federal Railroad Administration (FRA), BNSF experienced an annual average 106 fatalities and 245 injuries at its grade crossings, accounting for 19% and 14% respectively of the industry totals.[56] For the railroad industry as a whole, 80% of the grade-crossings accidents occur where there are no gates.[57] Evidence indicates that many of these accidents would have been avoided if gates had been installed. For example, FRA statistics show that the grade-crossing accident rates by traffic volume, are 10 times higher for stop signs and 5 times

higher for cross bucks, than they are for gates, as shown below:

Device	Accidents Per 100 AADT[58]	% of Devices[59]
- Stop signs	5.01	7%
- Cross bucks	2.46	48
- Bells, etc.	1.09	1
- Other	0.85	-
- Flashing lights	0.75	18
- **Gates**	**0.53**	**20**
- Unknown	0.34	3
- Special warning	0.33	3
Totals	1.00	100%

The above data confirms what the FRA had discovered in 1986 when it declared that: *Active traffic control devices have proven to be an effective method of improving safety and operations at railroad-highway grade crossings.*[60] The FRA position was based on its 1980 study showing the upgrading from passive to automatic gates to be 85% effective[61] – that is, resulting in an 85% reduction in accidents.

Based on the above data, by installing gates (and signals) at its passive crossings, BNSF could have been expected to eliminate a majority of its 106 average annual grade-crossing deaths and 245 injuries. Even if the impact from signals and gates was only a 50% reduction in accidents, over the 25-year expected life of a crossing gate, about 1,325 lives would be saved and over 3,060 injuries avoided. Other savings from gated crossings would include the costs to the railroad, expenses incurred by local communities, the cost of damaged cargo, and

possibly the catastrophic consequences of a major hazardous materials event.

There are numerous and widely varying estimates of the value of lives and estimating the cost of injuries, hazardous-materials spills, etc., is far from being a precise undertaking. For purposes of this report, it is sufficient to simply conclude that if BNSF installed signals and gates at its passive crossings, **countless billions of dollars of societal benefits would be realized.**

10. SAFETY CONSCIOUSNESS AT BNSF GRADE CROSSINGS IS COMPROMISED BY THAT RAILROAD'S ECONOMIC POLICIES.

BNSF's posture in regard to grade-crossing safety is consistent with its emphasis on cost cutting during the past two decades. The railroad seems to view grade crossings as an evil to be eliminated, and which otherwise should not require much in the way of railroad resources. After all, the BNSF's positions are that: (1) it is the government who should determine grade-crossing safety needs, (2) it is the government who should fund grade-crossing improvements, and (3) it is the motorist who is responsible for grade-crossing accidents. What is left for the BNSF to do is to follow FRA safety standards (which it is required by law to do), cut its vegetation, and provide some very modest funds to help educate motorists.[62] Furthermore, BNSF will fund some grade-crossing improvements – including the installation of automated gates – where it perceives some economic gain, such as a condtition [sic] for a railroad acquisition or merger.

Clearly, **BNSF's economic gains and safety at grade crossings are often mutually exclusive events.**

BNSF's mentality of denial and cost minimization, could be expected to lead to a company culture where safety consciousness at grade crossings could readily be compromised. This does not mean that BNSF employees are not at all concerned with safety, for there are many other aspects of railroad safety, and even in the case of grade crossings, there are some aspects of safety which BNSF seems to address. Rather, it means that the responsibility for grade-crossing safety has been presented to employees in such a narrow, limited, and negative context that they are apt to give it less thought, attention, and time, than it so properly deserves.

11. ADVERSE IMPACTS FROM BNSF'S POLICIES AND PROCEDURES TOWARD GRADE-CROSSING SAFETY WOULD MOST LIKELY BE EXPERIENCED AT ITS NON-GATED CROSSINGS.

The failure to adequately plan, lead, fund, maintain, repair, replace, observe, recognize, and/or communicate, can occur at any time and anywhere at BNSF's thousands of grade crossings, but the impact of such actions are more likely to be adverse at non-gated crossings. This is because non-gate crossings are less safe than passive crossings, and similarly, because automatic gates can mask what otherwise would be contributing factors to an accident. Furthermore, educational efforts directed at motorists have little, if any, impact on improving safety at passive grade crossings.

As discussed in Section 9 above, gate grade crossings are far much safer than passive crossings – for obvious reasons. Motorists know that a train is coming when a crossing gate is lowered. This is not necessarily the case for passive crossings. For example, in a study in Tennessee, it was found that:

> *54 percent of the drivers contacted believe that if a crossing does not have a signal, it is rarely used by trains. This may affect the driving behavior of those drivers as they approach passive crossings. Drivers who believe that signals are placed at all crossings that are regularly used by trains would logically be expected to drive as if they had the right-of-way unless they see a flashing signal or a lowered gate.*[63]

Furthermore, there are many contributing factors to accidents at non-gated grade crossings which would not result in accidents at gated crossings – that is, automated gates can mask human error (the railroad, motorist, and/or the highway administrator), as well as minimizing otherwise unsafe conditions. For example, even though a motorist's sight line may be obstructed, automated gates would most likely stop that motorist from advancing through the crossing. The same can be said when there is inclement weather, failure of the train engineer to blow the warning devices on time, and overly-grown vegetation along either the railroad track or highway.

Finally, it cannot be expected that attempting to educate motorists through such programs as "Operation Lifesaver," can materially, if at all, lower the safety risk at passive crossings. In fact, a relatively recent study sponsored by the Minnesota Department of Transportation

and undertaken by the University of Minnesota, concluded that there was ***no evidence that additional education programs or public awareness campaigns have any lasting effect on the frequency of grade accidents.***[64] Furthermore, the study noted that passive grade-crossing safety improvements were not effective, if those crossings remained passive. The study stated that:

> *We found no evidence suggesting that bigger or brighter or other modifications of traditional signs or signals led to favorable changes in drivers' behavior at grade crossings.*[65]

Thus, passive grade crossings are not nearly as safe as gated grade crossings and they cannot be expected to be made safer through motorist education. BNSF's denial of responsibility for planning and funding the activation of passive crossings has a significant adverse impact on meeting the continuing safety needs of those crossings.

12. THUS, IN THE CASE OF GRADE CROSSINGS, BNSF CHOSE ECONOMIC GAINS OVER THE SAVING OF LIVES, PERSONAL INJURIES AND PROPERTY DAMAGE.

BNSF could well have afforded to install automated gates at all of its passive grade crossings, and the benefits to society from such installations would have outweighed the costs. Furthermore, BNSF could have afforded to initiate a program of grade-crossing safety where it identified needs at its crossings. Instead, BNSF shirked its public responsibility by choosing solely economic gains over saving lives, personal injuries and property damage. Railroad economics and public responsibility are not an

either/or choice. Rather, a reasonable balance is required, which is absent in the case of BNSF. Such a balance is not a priority of the railroad industry in general, or BNSF in particular, as demonstrated by the following reaction of the AAR to a judicial decision in grade-crosing [sic] litigation.

> *Its the state highway people who decided to put highways over the railroad tracks. They're the highway safety experts. We didn't put the highway in, and frankly, we would prefer that it not be there.*[66]

It is obvious that BNSF believed that the economic benefits of investing in adequate grade-crossing safety did not warrant the cost. Consequently, it used tens of billions of dollars derived from cost cutting (mainly from terminating employees) to: (1) reward top executives for their costcutting successes, (2) provide larger returns and dividends to its investors, (3) increase its already substantial market share by purchasing other railroads – especially, the SF, and (4) constrain prices to selected customers. The large amounts associated with these actions are in stark contrast to BNSF's voluntary lack of expenditures on the installation of adequate grade-crossing facilities, and its apparent reduction in maintenance expenses at its grade crossings.

BNSF's policy of denying responsibility for adequate grade-crossing safety and inappropriately relying on a limited public funding program not only leads to inadequate capital investment, maintenance, and personnel levels related to grade crossings, it also breeds an overall staff attitude of ambivalence and negligence. The end result is increased risk to the people and goods crossing BNSF's track structure.

ENDNOTES

1. The acquisition of the Atchison Topeka and Santa Fe Railway Company (SF) by the Burlington Northern Railroad Company, approved by the Interstate Commerce Commission on September 22, 1995 resulted in the formulation of the Burlington Northern Santa Fe Corporation – referred to as BNSF. Statistical data presented in this paper represents the Burlington Northern Railroad (BN) from 1980 to 1995, and the BNSF beginning in 1996, although all references to such statistics will be for the BNSF.

2. *Staggers Rail Act of 1980*, Public Law 96-448, 96th Congress, 49 USC 10101, October 14, 1980.

3. Other railroad legislation included the *Rail Passenger Service Act of 1970* (creating Amtrak and freeing railroads from huge passenger-service losses), the *Regional Railroad Reorganization Act of 1973* (aiding and reorganizing financially depressed railroads). and the *Railroad Revitalization and Regulatory Reform Act of 1976* (liberalizing regulation).

4. *National Transportation Policy*, Report of the Committee on Commerce, United States Senate, by the Special Study Group on Transportation Policies in the United States, 86th Congress, June 26, 1961. A second report was published in 1974 updating the 1970 report and focussing on capital. needs.

5. Association of American Railroads, *ASTRO Report*, America's Sound Transportation Review Committee, July 24, 1970.

6. The BNSF's 1980 ROE includes the St. Louis-San Francisco Railroad which was acquired by the BN in November 1980.

7. Association of American Railroads, *Analysis of Class I Railroads*, 1978, 1979, 1980.

8. *Ibid.*, 1980.

9. *Ibid.*, p. 162.

10. *Ibid*, 1996, p. 91.

11. Railroad inflation is measured by the *Railroad Cost Recovery Index*, (RCR) calculated and published quarterly by the Association of American Railroads. In 1980 the RCR was 140.1 as compared with 263.0 in 1996, 267.1 in 1997 and 270.9 in 1998. The 88% increase in railroad inflation between 1980 and 1996 is derived at by divided the 263.0 index figure in 1996 by the 140.1 figure in 1980. See Association of American Railroads, *Railroad Ten-Year Trends 1980-1989* p. 74 and *1988-1997*, p. 70.

12. Aside from the SF, the BN acquired two railroads on January 1, 1982: the Colorado and Southern and the Fort Worth and Denver.

13. *Analysis, op. cit.*, annual publications.

14. The average annual wage of the BNSF in 1995 was $556,387. It is estimated that fringe benefits add another 33%, or $18,608, to wages, resulting in $74,995 annual average compensation. The 33% fringe-benefit premium was adopted because it was the difference between all-railroad annual average wages and all-railroad annual average compensation, as provided by the Association of American Railroads, in *Railroad Ten-Year Trends*, for the year 1997.

15. *Proxy Statement* (to SEC), BNI, March 10, 1995 (for year 1994), p. 18.

16. The 1980 BNSF average compensation was calculated by adding 23.5% fringe benefits (the railroad industry average) to BNSF's annual average salaries for "executives" of $38,239. The 1998 figure is similarly calculated by using a $104,843 reported salary

figure and adding 33% in fringe benefits. Data were taken from *Analysis, op. cit.*, 1980 and 1998.

17. The GDP (Gross Domestic Product) Implicit Price Deflator increased from 60.3 in 1980 to 112.7 in 1998, equating to 87%. *Economic Report of the President*, February 1999.

18. *Proxy Statement, op. cit.*, p. 17.

19. *Ibid*, p. 24.

20. *Ibid.*

21. *Ibid.*

22. *Ibid.*, p. 10.

23. *Ibid.*, p. 8.

24. *Ibid.*

25. Inflation measures the prices of resources, not the total cost of those resources. For example, inflation measures the hourly wages paid to employees and the price per gallon of fuel. While wages and fuel prices may increases, costs may fall because of employee downsizing and increased fuel efficiency.

26. BNSF freight operating expenses per ton-mile declined from 2.74 cents in 1980 to 1.68 cents in 1989. *Analysis, op. cit.* 1980 and 1989.

27. Equity investors benefitted in a variety of ways. According to the *Analysis, op. cit.*, from 1980 to 1998, BNSF's share of the railroad market increased as follows: miles operated, from 15:3% to 17.0%; operating revenue, from 12.2% to 16.5%; and, revenue ton-miles, from 16.9% to 22.9%. Second, BNSF's net railroad operating income increased from $210 million in 1980 to about $473 million in 1998. Third, BNSF'S ROE increased from 5.9% in 1980 to levels generally in the 14%-17% range in the 1990s. And

finally. BNSF paid out over $100 million in dividends annually.

28. BNSF maintenance expenses at grade crossings are reported in Schedule 410. *Railway Operating Expenses*, of railroad annual reports filed with the Interstate Commerce Commission from 1980-1995 and the Surface Transportation Board since 1996.

29. U.S. Department of Transportation, Federal Railroad Administration, *Highway-Rail Crossing Accident/Incident and Inventory Bulletin* 1980 and U.S. Department of Transportation, Federal Railroad Administration, *Railroad Safety Statistics*, 1977.

30. *Federal Rail Safety Act*, Public law 91-458, 84 Stat. 971, October 16, 1970.

31. *Highway Safety Act of 1973*, 23 U.S.C., Section 130.

32. National Committee on Uniform Traffic Control Devices, *Manual on Uniform Traffic Control Devices*, U.S. Department of Transportation, Federal Highway Administration.

33. Archie C. Burnham Jr. and Bernard S. Abrams. *Roadway Through the MUTCD*, Lawyers & Judges Publishing Company, Inc., 1998, p. v.

34. *Highway Safety Act of 1973, Ibid.*, Section 104(b)(2)(6).

35. Harvey A. Levine, *National Transportation Policy: A Study of Studies*, (Lexington Books: D.C. Heath and Company: Lexington, Massachusetts), 1982.

36. *Analysis 1998, op. cit.*, p. 95.

37. Based on an average train weight of 5,400 tons and an average automobile weight of 1.8 tons.

38. In fact, as early as 1837 a court found that railroads have a public nature. In *Bloodgood v. The Mohawk & Hudson Railroad (Co.)*, 18 Wendell (N.Y.) 9, 21, a New

York courted stated: *Because the legislature permitted the company to remunerate itself for the expense of constructing the road, from those who should travel upon it, its private character is not established; it does not destroy the public nature of the road, or convert it from a public to a private use.*

39. Like other railroads, BNSF (including its predecessors) received free land surveys, the right of eminent domain, land grants, low-interest loans, bond guarantees, tax exemptions, and cash grants. In fact, according to the 1934 *Report of the Federal Coordinator of Transportation*, the BNSF (including the SF) received 61 million acres of land grants, equating to 47% of the 130 million acres received by all railroads.

40. The *Railway Labor Act of 1926* (44 Stat. 577, 45 U.S.C. 151), protects railroads from prolonged work stoppages. Since World War II, there have been only five nation-wide railroad strikes with a total of 10 lost work days.

41. Unlike other industries, if railroads and airlines file for bankruptcy, their financed rolling stock returns to the creditors. *The filing of a security interest in railroad rolling stock with the ICC pursuant to 49 USC 11303 creates a right for a creditor holding that interest to take possession of such rolling stock upon default, notwithstanding that the carrier has entered bankruptcy proceedings.* (U.S. Code, Title II, USCA, Section No. 1168.)

42. At various times throughout their history, railroads have received public subsidies. BNSF interlines with a number of such railroads.

43. The *National Transportation Policy* was initially stated as the preamble to the *Transportation Act of 1940*, but many other expressions of such a policy have been

forthcoming from Congress and the U.S. Department of Transportation since that time.

44. *Federal-Aid Highway Act of 1973*, Public Law 93-87; 87 STAT. 250, 1973.

45. U.S Department of Transportation, Federal Highway Administration, *Railroad-Highway Grade Crossing Handbook*, August 1978, p. 68.

46. *Plumber v. Murphy Trucking Co. Mo.*, Jackson County Cir. Ct., No. CV94-14667, September 9, 1996.

47. *Isbell v. State, Ariz.*, Maricopa County Super. Ct., No. CV 91-19192, November 3, 1997.

48. *Roberts v. Consolidated Rail Corporation*, U.S. District Court, N.D.N.Y., No. 85-CV-08, September 14, 1988.

49. *Cruz v. Atchison, Topeka & Santa Fe Ry.*, Tex., El Paso County Ct. At Law, No. 94-8483, September 19, 1997.

50. *Runkle v. Burlington Northern*, 188 Montana, 186, 613 P. 2d 982, 1980. *Brown v. Missouri Pacific Railroad*, 543 F. Supp. 348, W.D. Arkansas, 1982, and *Karl v. Burlington Northern Inc.*, 880 F. 2d 68, 76, 8th Cir., 1989.

51. *Ibid., Karl.*

52. *CSX Transportation v. Easterwood*, 113 S. Ct. 1732 (1993).

53. Inquiries by the author of this paper as to the cost of automating passive grade crossings ranged from $50,000 to $150,000. A number of individuals echoed the conclusions of a study in Oregon which found that the railroad's stated cost of installation may exceed that of a contractor's by more than 150%. (Gregory A. Malkasian, "Regulatory Issues – Crossing Safety in Oregon," *Proceedings 1992, op. cit.*, p. 63.)

54. *Analysis, op cit.*, 1998.

55. The actual dividend in 1998 was 48 cents. but because of a 3-for-1 stock split, it is equivalent to $1.44 compared with 1997.

56. *Railroad Safety Statistics, op. cit.*, Table I-13.

57. *Ibid.*, Table 7-9.

58. *Ibid.*, Table 8-2.

59. *Ibid.*, Table 8-3.

60. *Railroad-Highway Grade Crossing Handbook, op. cit.*, p. 104.

61. *Ibid.*

62. Operating Lifesaver is a public awareness program dedicated to motorist education about grade crossings. Started in 1972, the program is largely funded by the federal government, with the majority of other funds coming from the railroad industry.

63. John E. Tidwell, Jr., "Motorists' Understanding of Railroad-Highway Grade Crossings," *Proceedings 1990, op. cit.*, p. 369.

64. Stirling Stackhouse, University of Minnesota, Human Factors Research Laboratory, *Effectiveness of Marketing Campaigns for Grade Crossing Safety*, Minnesota Department of Transportation, September 1996.

65. *Ibid.*

66. Tom White, Association of American Railroads, as cited by Steve Jordan, Staff Writer, Omaha World-Herald Company, September 29, 1999.

APPENDIX 11

THE NORFOLK SOUTHERN RAILROAD AND GRADE-CROSSING SAFETY

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This report* addresses the attitude and behavior of the Norfolk Southern (NS) railroad in regard to its responsibility to provide for safe crossing of its track structure. The report concludes that:

1. Deregulation of railroads in 1980 provided the NS with an extraordinary opportunity to meet not only its economic obligations, but also its public responsibility to provide for adequate safety at its grade crossings.

2. Spurred by financial incentives to do so, NS executives used their newly-found freedom under deregulation to focus on economic gains

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* Unless otherwise noted, railroad statistics presented in this report derive from Class I railroad annual reports (R-1s) filed annually with the Surface Transportation Board. These data are processed, reformatted and sold by the Association of American Railroads (Washington, D.C.) in two annual publications which are extensively used in this report: *Analysis of Class I Railroads* (annual publications from 1978 to 1998) and *Ten-Year Trends* (1980-1989 and 1988-1987 editions).

by massively cutting operating expenses, thereby saving billions of dollars and gaining rewards for themselves and others.

3. At the same time, while it could well afford to do so, NS refused to accept responsibility for determining the need for, and funding of, safety devices at its grade crossings – instead, inappropriately relying on a limited federal-aid program for such endeavors.

4. NS's refusal to fully accept its responsibility for grade-crossing safety is in conflict with the logic of shared existence, the railroad's public nature and responsibility, and National Transportation Policy.

5. While public involvement in, and funding of, grade-crossing maters [sic] has been one of a number of factors contributing to the decline of grade-crossing accidents, it is inappropriate to treat that program as the sole identifier and primary financier of safety needs at such crossings.

6. In fact, if NS had accepted its public responsibility to provide for adequate safety at grade crossings, the accident rate would have been lower.

7. Thus, the proper balance between public and private responsibility for grade-crossing safety – especially when it involves a privately-owned-and-operated industry vested with a public responsibility – should not be undermined by overstating the scope of limited federal funding.

1. DEREGULATION OF RAILROADS IN 1980 PROVIDED THE NS WITH AN EXTRAORDINARY OPPORTUNITY TO NOT ONLY MEET ITS ECONOMIC OBLIGATIONS, BUT ALSO TO MEET ITS PUBLIC RESPONSIBILITY TO PROVIDE FOR ADEQUATE SAFETY AT ITS GRADE CROSSINGS.

The Staggers Rail Act of 1980 (PL 96-448) deregulated much of the railroad industry's economic behavior, culminating a decade of favorable railroad legislation. Section 6 of the Act recognized that railroad earnings were *insufficient to generate funds for necessary capital improvements,* somewhat excusing the industry for past investment shortfalls, but indicating that the anticipated turnaround would require railroads to fulfill their economic and social obligations.

The *Rail Transportation Policy* section of the Staggers Rail Act identified expected economic and social benefits which would accrue to four parties – the first three being economic beneficiaries: (1) shippers, or customers, were to receive reasonable rates, sound transportation, and the avoidance of undue concentration of market power, (2) investors, or shareholder's, were to realize adequate returns, and (3) employees were to receive *fair wages and safe and suitable working conditions.* In regard to societal benefits, the public was to enjoy a rail transportation system *without detriment to the public health and safety.* Railroad-highway grade crossings were not excluded from the *safety* goal.

The relationship between a railroad's financial posture and the safety it provides is patently obvious and has long been recognized. During the general decline of

the railroad industry in the 1950's, 60's and 70's, numerous studies cited the danger of deferred maintenance being accumulated by railroads. Two such major efforts were: (1) a report by the U.S. Senate's Committee of Commerce entitled, *National Transportation Policy* (June 26, 1961), which called for the need of railroad regulatory reform, and (2) the railroad industry's own report entitled, *America's Sound Transportation Review Organization* (July 24, 1970), which stressed that improved earnings were needed to eliminate inadequate capital investment, and concluding that it was in the public interest to have financially-healthy railroads. Similarly, Section 3 of the Staggers Rail Act stated that: *The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States.* Specifically in regard to grade-crossing, in 1978 the Federal Highway Administration (FHA) stated in its *Railroad-Highway Grade Crossing Handbook* (August 1978, p. 68) that:

> *It may be expected that as the financial condition of an individual railroad deteriorates or improves, the company's commitment to grade crossing improvement financing will change.*

Clearly, one of the societal expectations of financially-sound railroads was that they would make adequate expenditures and capital investment in order to provide safe operations and facilities for those who use and are affected by their operations.

With much of the railroad industry in the financial doldrums during the 1970's, it was not surprising that the Staggers Rail Act (Section 2) stated that railroad earnings

were *the lowest of any transportation mode and . . . insufficient to generate funds for necessary capital improvements,* and that without the legislation railroads would experience a capital shortfall of $16-$20 billion by 1985. However, NS was an exception to the overall dismal financial performance of the railroad industry.

As shown below, the two pre-merged (1982) railroads enjoyed rates of return on equity – that is the returns to shareholders after all expenses, interest payments, and taxes are paid – which were more than three times the industry average between 1978 and 1980.

	Rate of Return On Equity		
Year	All Railroads	Norfolk & Western	Southern
1978	1.3%	14.1%	12.0%
1979	5.5	15.1	13.9
1980	6.0	15.7	14.1
Three-year Average	4.3%	15.0%	13.3%

Since the Staggers Rail Act was to stimulate a financial *turnaround* for the financially-deprived railroads, the NS, as a financially healthy railroad, was given an extraordinary opportunity to further increase its earnings and fulfill its responsibilities, including that of providing safe grade crossings.

2. SPURRED BY FINANCIAL INCENTIVES TO DO SO, NS EXECUTIVES USED THEIR NEWLY-FOUND FREEDOM UNDER DEREGULATION TO FOCUS ON ECONOMIC GAINS BY MASSIVELY CUTTING OPERATING EXPENSES, THEREBY SAVING BILLIONS OF DOLLARS AND GAINING REWARDS FOR THEMSELVES AND OTHERS.

Despite its financial strength, NS reacted to its newly-found economic freedom under deregulation by massively slashing operating expenses. Aside from the usual market pressures to cut costs, NS executives were spurred by a compensation program which aligned their interests with those of NS shareholders. This is because a significant portion of NS executive compensation is based on three equally-weighted financial measures which are averaged over a three-year period: (1) growth in earnings-per-share, (2) return on invested capital, and (3) operating ratio, measured absolutely and relative to other railroads. (See NS *Proxy Statements* filed with the Security & Exchange Commission.) NS bonuses, other annual compensation, and especially long-term compensation in the form of stock grants and stock options, are tied to the financial performance measures. Only salaries escape this dependency. Thus, even if NS was in a sound financial position when it was deregulated, there were strong incentives to cut costs and earn even higher earnings.

At the heart of NS cost cutting were substantial reductions in the labor force. In 1980, the two NS predecessors had a labor force of 43,339 employees as compared with only 23,323 employees in 1997. As a result of this reduction and other economic efficiencies, NS was

highly successful in reducing its operating expenses (adjusted for traffic) since 1980. In 1980, NS's cost of producing a ton-mile of traffic was 2.48 cents, while in 1997 the figure dropped to 2.21 cents, equating to an 11% reduction over the 17 years. What is even more startling is that the 11% cost reduction was made in the face of a 91% increase in railroad inflation. ("Railroad Cost Recovery Index," calculated and published quarterly by the Association of American Railroads). Consequently, the 2.21-cent cost in 1997 is equivalent to 1.15 cents in 1980 dollars (inflation index of 100/191 x 2.21 cents). Thus, in inflation-adjusted terms, NS's cost savings in 1997 compared with 1980 is 1.13 cents per-ton-mile (2.48 cents minus 1.15 cents), amounting to a 46% reduction in operating costs. In 1997 NS carried 136 billion ton-miles of traffic, so that the 1.15 cents-per-ton-mile savings in that year alone equated to $1.6 billion (1.15 cents x 136 billion ton-miles). While similar calculations can be made for the intervening years between 1980 and 1997, it is sufficient to conclude that NS cost cutting since deregulation saved the railroad billions of dollars.

There were a number of economic beneficiaries from the huge cost savings realized by NS since deregulation, as identified below.

1. *NS Executives*: While national inflation (as measured by the "Gross Domestic Product Implicit Price Deflator," published in the annual *Economic Report of the President*) increased by 86% from 1980 to 1997, NS average annual executive compensation – excluding stock grants and options – increased by more than 165%

during the same period. Furthermore, NS executives earned countless millions of dollars in long-term (stock) compensation.

2. *Other NS Employees*: The average NS employee enjoyed a 125% increase in annual compensation from 1980 to 1997.

3. *Railroad Shippers*: Customers benefitted from constrained pricing – that is, some rate reductions, and rate increases below the level of inflation. The NS freight-revenue-per-ton-mile was virtually the same in 1980 and 1997 in spite of the 86% increase in national inflation.

4. *NS Shareholders*: NS investors were rewarded with sustained relatively high earnings, increased dividends, and growth in corporate value. For example, over the past decade, NS net income has generally ranged in the $600-$750 million range, and annual dividends have steadily increased from 42 cents-per-share to 80 cents-per-share, in spite of several stock splits. (See Norfolk Southern Corporation 1998 annual report to stockholders). In fact, NS railroad net income rose to $859 million in 1997, even though the company experienced unusual expenditures related to its purchase of Conrail. Furthermore, the book value of NS shareholders' equity increased from $2.8 billion in 1980 to $6.0 billion in 1997. Consequently, the sound financial condition of NS gave the railroad the ability to expend about $6 billion in purchasing 58% of Conrail in 1998.

While the NS executive compensation may have *pulled* NS executives into a draconian costcutting program, what *pushed* them was a provision in the Staggers Rail Act which allowed railroads to freely make quarterly

price increases up to the levels of the industry's rate of inflation. This escalation basis was in lieu of rate changes tied to a unit-of-cost index – most notably, operating expense per ton-mile of traffic. Beginning in mid-1989, the Interstate Commerce Commission required the railroad inflation index to be adjusted for productivity gains, and although still beneficial to railroads, its use as an industry-wide, tariff adjuster, dramatically declined. Still, from 1980 to 1989, railroad inflation increased by 70%, while NS operating expenses per ton-mile increased by only 15%. Consequently, NS could raise its freight rates up to 55 percentage points greater than its cost increase (70%-15%), without regulatory interference. While not all NS freight rates increased by the allowable 70% (because of varying intensities of competition among transportation markets), rates accelerated enough to result in substantial earnings.

3. AT THE SAME TIME, WHILE IT COULD WELL AFFORD TO DO SO, NS REFUSED TO ACCEPT RESPONSIBILITY FOR DETERMINING THE NEED FOR, AND FUNDING OF, SAFETY DEVICES AT ITS GRADE CROSSINGS – INSTEAD, INAPPROPRIATELY RELYING ON A LIMITED FEDERAL-AID PROGRAM FOR SUCH ENDEAVORS.

While it is patently clear is that NS used its massive cost savings since deregulation to meet – and in fact, exceed – economic needs, but the railroad did not make an adequate commitment to grade-crossing safety. On the contrary, the NS attitude is generally expressed by a recent quotation from a representative of the Association

of American Railroads – the railroad industry's major trade association of which NS is one of the four key members – stating:

> *They're the highway safety experts. It's the state highway people who decided to put highways over the railroad tracks. They're the highway safety experts. We didn't put the highway in, and frankly, we would prefer that it not be there.* (Quote by Tom White, as cited by Steve Jordan, Staff Writer, Omaha World-Herald Company, September 29, 1999.

This attitude of, *We were there first*, and thus *the hundreds of thousands of miles of public roads is a nuisance to our operations*, is reminiscent of the 19th century railroad mogul William Vanderbilt's famous line in regard to accusations that his railroad was a monopoly – *The public be damned*.

NS's attitude and culture affecting grade-crossing safety is more specifically identified in company documents relating to the establishment of its Grade Crossing Safety Steering Committee. At the initial meeting of the Steering Committee on January 25, 1993, it was acknowledged that, *in 1989 and 1990 grade crossing accidents were the leading cause of train accident costs*. At the April 26, 1993 meeting of the Committee, it was revealed that the NS had led the industry for the past 6 years with the highest incident record of all railroads. The Committee also noted that, *other railroads have a great deal more success than Norfolk Southern in eliminating crossings*. In view of, and in fact in spite of, its own shortcomings, ensuing

Steering Committee meetings resulted in the establishment of three major NS goals regarding its grade crossings, as follows:

1. The public has the responsibility for identifying grade-crossing safety needs and for providing the overwhelming majority of funding for ensuing saving improvements, and the NS should maximize its use of public funds.

2. It is the motorist who is to blame for grade-crossing accidents, and NS will support motorist education through a centralized effort – largely funded with federal monies – entitled, *Operation Lifesaver*, and

3. NS prefers that grade crossings be closed and will induce such closure with the offer of a one-time payment to local communities.

These goals were part and parcel of an NS policy statement, established at the October 11, 1993 meeting of the NS Steering Committee, as follows:

> *Signal improvements are funded in whole or in part, with public monies. It is the goal of Norfolk Southern Corporation to achieve maximum participation in the use of these funds by actively encouraging local, state and federal governments to authorize and fund improvements at crossings on the NS system. In appropriate situations, corporate funds will be expended in order to facilitate crossing closure or to guarantee completion of a project which would otherwise fail to be implemented for lack of local matching funds.*

Such a policy leads the question as to whether the public program which NS relies upon for grade-crossing

safety determinations and ensuing funding, was intended to be the sole source for such activities. An examination of the limited nature of that program results in a resounding, *No* to that question.

In 1970, the Federal Rail Safety Act (Public Law 91-458, October 16, 1970) declared that among other things, *laws, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable*. This legislation was followed by the Highway Safety Act of 1973 (23 U.S.C. Section 130) which required the states, in order to acquire federal funds for grade-crossing improvements, *conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices and implement a schedule of projects for this purpose.* Furthermore, the federally-funded changes (improvements) to be made at grade crossings were to be of a standard types in accordance with the *Manual on Uniform Traffic Control Devices* – a compendium of uniform standards for design and use of traffic control devices by public authorities and officials having jurisdiction over traffic operations At the same time, where desirable, nothing prohibited the railroad from seeking approval of an installation and total railroad financing of an active warning device that was not schedule to be installed by a public determination and funding. The railroad's proposed installation could still be approved by the appropriate state agency and still be in conformity with the Manual. In essence, the combination of federal funding for grade-crossing safety through the various states, and the goal of uniform grade-crossing safety devices, did not

absolve the NS from its responsibility for safe grade crossings because:

1. Like many other federal-aide programs, the funding for grade-crossing safety was never designed to put the federal government in total control of the activity it was helping to fund. The federal criteria established to allocate federal funds for grade-crossing improvements should not be confused with judgments about the adequacy of safety levels at all grade crossings in the United States.

2. The 1973 legislation was little more than an extension of a program which had existed for many years, and nothing in any legislation – including the 1973 Act – concluded that grade-crossing safety was to be an exclusive public responsibility.

3. The level of federal funds for grade-crossing safety has been limited and their distribution has been based on criteria other than safety needs. This is because 50% of the funding is distributed to states based on the number of crossings in each state, 25% is based on the population of urban areas, and 25% on general measures, evenly divided among size of area, population of rural areas, and rural delivery and intercity mail route mileage); 0.5% of federal monies is the minimum allocated to any state.

4. Filtering federal money through the states does not in itself constitute a federal grade-crossing standard; it is simply a way to distribute the money.

5. There is no consistency among the states as to how they determine which grade-crossing projects to undertake and fund. In fact, some

states do not use all of their allotted grade-crossing funds for grade-crossing improvements.

6. The sole reliance on a public program equates to a sole reliance of bureaucratic and sometimes time-consuming decisions potentially fraught with political considerations. (For example, see *Audit of Tennessee DOT*, reflecting the poorly operated program that the railroad relies on to replace its own responsibility for grade-crossing safety.) Where public dollars are limited and related programs are mismanaged, the railroad's duty is heightened, and

7. Grade-crossings moneys generally meet the exceptions of the Highway Safety Act. By their very nature, grade crossings are local in character and both railroad and publicly-sponsored improvements in grade-crossing safety can easily conform to federal rules and not create an under [sic] burden on interstate transportation.

4. NS'S REFUSAL TO FULLY ACCEPT ITS RESPONSIBILITY FOR GRADE-CROSSING SAFETY IS IN CONFLICT WITH THE LOGIC OF SHARED EXISTENCE, THE RAILROAD'S PUBLIC NATURE AND RESPONSIBILITY, AND NATIONAL TRANSPORTATION POLICY

Aside from the fact that the Federal Rail Safety Act of 1970, the Highway Safety Act of 1973, and/or the *Manual of Uniform Traffic Control Devices* do not release NS from its grade-crossing safety responsibility, there are a number of reasons why the NS is responsible for safety at its grade crossings. As discussed below: (1) It is simply logical for two or more parties which share a facility,

service, and/or location, to also share the responsibility for safety. (2) NS has been vested with a *public nature* and thus, a responsibility to the public which licensed it, subsidized it, and to which it serves, and (3) National Transportation Policy dictates that railroads have a responsibility for grade-crossing safety.

Logic of Shared Existence

It is patently logical to conclude that when two modes of transportation intersect each other, those modes have a shared responsibility for safety at those intersections (crossings). After all, if it were not for either of the modes, there would be no crossings and thus, no related accidents. NS is one of four dominant railroads in the country and one of two large railroads which handle the overwhelming portion of traffic in the eastern United States. With trains outweighing automobiles by a 3,000-to-1 ratio (based on average train weight of 5,400 tons and average automobile weight of 1.8 tons) and allegedly taking a mile or so to stop, it is incumbent upon NS to provide adequate safety to those crossing its publicly-vested track structure. When one considers that NS is the only entity passing through its many grade crossings on a daily basis, it becomes clear that NS has a major role in providing and maintaining reasonably safe grade crossings.

Public Responsibility

Unlike most other companies in the United States, NS has an inherent *public nature*. As early as 1837, a court

(*Bloodgood v. The Mohawk & Hudson Railroad Co.* 18 Wendell, N.Y. 9, 21) found such a *nature* in stating:

> *Because the legislature permitted the company to renumerate itself for the expense of constructing the road from those who should travel upon it, its private character is not established; it does not destroy the public nature of the road or convert it from a public to a private use.*

While privately owned, NS (actually, the predecessor railroads) was birthed and developed in the mid-1800s with massive public aide – ranging from outright grants of funds, to land grants, low interest loans, and tax exemptions. Then in 1887, the federal government regulated railroads in a manner different than other industries and has continued to treat railroads as a rather unique industry. Railroads are immune from antitrust laws affecting other industries. They benefit from special anti-strike legislation (under the Railway Labor Act of 1926), special bankruptcy provisions (U.S.C. 1168), and public-assistance. Railroad employees fall under their own workers' compensation, unemployment insurance, and retirement systems, rather than being under state programs and federal social security.

The public nature cf NS is not a one-way street as it has obligations to the public which licensed and is affected by it. From an economic viewpoint, NS has a common-carrier obligation and must provide joint rates, through routes, non-discriminatory service and reasonable rates. To society, it must provide safe facilities and operations, notwithstanding federal assistance. Grade crossings are railroad facilities which have not been excused from this societal obligation.

National Transportation Policy

The first official declaration of a National Transportation Policy was established as the preamble to the Transportation Act of 1940 (amending the Interstate Commerce Act of 1887). The 1940 policy statement was a broadly worded reference to the need for *safe* transportation service, as were many other subsequent policy statements emanating from the U.S. Department of Transportation. But specific expressions of national policy have also emerged, including the affirmation that railroads have responsibility for improving grade-crossing safety. For example, both the Interstate Commerce Commission and Surface Transportation Board have required railroads to upgrade safety at grade crossings, as a condition of proposed railroad mergers or acquisitions of other railroads. In some cases, railroads negotiated safety upgrades with local communities, fully aware that the regulatory agency desired such safety improvements. The point is, no matter what the reason for grade-crossing improvements related to railroad mergers, the railroad – and not the government – was required to finance the upgrades. These improvements included the installation of automated gates and lights. Most recently (in 1998), NS installed and financed improved safety devices at grade crossings, as a condition of its acquisition of part of Conrail. Clearly, the federal government has acknowledged that railroads share in the responsibility for grade-crossing safety. At the same time, there is no public policy and/or document that states that the government has the sole responsibility for grade-crossing safety, including the enabling 1973 legislation.

5. WHILE PUBLIC INVOLVEMENT IN, AND FUNDING OF, GRADE-CROSSING MATTERS HAS BEEN ONE OF A NUMBER OF FACTORS CONTRIBUTING TO THE DECLINE IN GRADE-CROSSING ACCIDENTS, IT IS INAPPROPRIATE TO TREAT THAT PUBLIC PROGRAM AS THE SOLE IDENTIFIER AND PRIMARY FINANCIER OF SAFETY NEEDS AT SUCH CROSSINGS.

There is no disputing that federal involvement in grade-crossing safety has had some positive results. After all, largely aided by federal and state funding, the number of grade crossings with automated gates and lights has increased from 7,310 in 1970 to 31,696 in 1997 (see Federal Railroad Administration's 1970 *Report to Congress: Railway-Highway Safety* and its 1997 *Railroad Safety Statistics*); it has been well established that such active devices are the safest type of grade-crossing facilities. However, there are other major reasons why the grade-crossing accident rate has declined.

First, the accident rate prior to 1980 had been abnormally high because a number of railroads were in, or close to, bankruptcy. Maintenance had been deferred and railroad operating conditions were often deplorable. In essence, while commendable, a reduction from an extraordinary level of accidents should not in itself be used as an indication of future success. The current grade-crossing death rate of about 450 people annually has been declared unacceptable for an industry thought to be operating only about 4,000-5,000 trains daily. Such an accident rate would certainly be condemned in the commercial airline industry. Second, total track mileage

owned by railroads in this country has shrunk dramatically, declining from 176,745 miles in 1970 to 99,516 miles in 1997.

While there have been some mileage increases for small (non-Class 1) railroads, these carriers operate relatively slow trains, and have virtually no high-speed, Amtrak and commuter trains running over their light-density lines. Third, the total number of public grade crossings in this country has declined from 231,750 in 1970 (see 1970 *report* reference above) to 160,395 in 1997 (*Railroad Safety Statistics* cited above). Obviously, the reduction of 77,229 miles of track and the elimination of 71,355 grade crossings from 1970 and 1997 had a lot to do with the reduction in grade-crossing incidents during those years. Fourth, there is the matter of improved engineering – including braking systems – of motor vehicles, having a positive impact on motorist reaction to trains passing through crossings. Finally, the decision of the Supreme Court in the *Easterwood Case* has put railroads – particularly the NS – on notice that they have a duty to identify the hazards at their public crossings and to respond with safety initiates.

The reduction of railroad mileage and the closure of grade crossings cannot be expected to continue. As the population and commerce continue to grow and expand, a core railroad system is emerging and the more susceptible grade-crossing closings have already occurred. Consequently, in the future, lowering the grade-crossing accident rate in a timely and efficient manner will require more than the application of a federal program, limited as follows:

1. The criteria for budgeting federal monies for grade-crossing safety is somewhat political and thus, not based solely on safety needs. In fact, these funds have declined in recent years. For example, according to data supplied by the FHA, federal funding of about $196 million in each of years 1977 and 1978 dropped to $155 million in 1999. Given a national inflation rate of about 149% between 1977 and 1999, the *real* (inflation-adjusted) decline in federal funding has been dramatic.

2. The allocation of federal monies to the various states is also partially based on non-safety factors, including both urban and rural population levels.

3. There is no uniformity among the states as to how their federal monies will be used to upgrade safety devices at their grade crossings, and

4. In many instances, states used their federal funds for grade-crossing safety on projects not involving grade crossings.

As an illustration of the limited federal funding for grade-crossing safety, consider the case of a state such as Tennessee. In 1997, Tennessee received a total of $3.3 million in federal funds for grade-crossing safety; $1.63 million was designated to be used for protective devices and the other $1.63 for the elimination of hazards (data provide [sic] by FHA). In that year, Tennessee was recorded as having 3,246 grade crossings, of which 2,910 were passive. (1997 *Railroad Safety Statistics*).

Assuming that all $3.3 million were to be used by Tennessee to install gates and lights at its passive crossings, and that the $3.3 million represented a 90% federal share, a total of $3.7 million would be available for signalization in a given year. At an average cost of $150,000 each (based on railroad estimates), only 25 crossings could be signalized annually. This means that it would take Tennessee 116 years (2,910 passive crossings divided by 25 installations per year) to signalize all of its crossings. Of course, lower costs would result in more potential installations. This illustration, while subject to refinement, demonstrates the need for significantly more railroad involvement in determining grade-crossing safety needs, and the funding of gate installations.

6. IN FACT, IF NS HAD ACCEPTED ITS PUBLIC RESPONSIBILITY TO PROVIDE FOR ADEQUATE SAFETY AT GRADE CROSSINGS, THE ACCIDENT RATE WOULD HAVE BEEN LOWER

There is little doubt that grade-crossing safety would have improved even further if NS had accepted its responsibility for such safety, including the voluntary installation of automated gates at its passive crossings. NS's mentality of denial and cost minimization, could be expected to lead to a company culture where safety consciousness at grade crossings could be compromised. This does not mean that NS employees were not at all concerned with safety, for there are many other aspects of railroad safety, and even in the case of grade crossings, there are some aspects of safety which NS seems to address. Rather, it means that the responsibility for grade-crossing safety has been presented to employees in

such a narrow context that they are apt to give it less thought, attention, and time, than it so properly deserves.

The failure to adequately plan, lead, fund, maintain, repair, replace, observe, recognize, and/or communicate, could occur at any time and anywhere at NS's thousands of grade crossings, but the impact of such actions were more likely to be adverse at non-gated crossings. This is because non-gate crossings are less safe than passive crossings, and similarly, because automatic gates can mask what otherwise would be contributing factors to an accident.

According to the Railroad Safety Statistics (1997) cited above, 80% of the grade-crossings accidents occur where there are no gates. At the same time, the same federal agency – the Federal Railroad Administration – has concluded (in its *Railroad-Highway Grade Crossing Handbook*) that grade-crossing accident rates by traffic volume, are 10 times higher for stop signs and 5 times higher for cross bucks, than they are for gates, as shown below:

Device	Accidents Per 100 AADT	% of Devices
- Stop signs	5.01	7%
- Cross bucks	2.46	48
- Bells, etc.	1.09	1
- Other	0.85	-
- Flashing lights	0.75	18
- **Gates**	0.53	20
- Unknown	0.34	3
- Special warning	0.33	3
Totals	1.00	100%

Thus, it was no surprise when the Federal Railroad Administration declared (in its *Handbook*) that: *Active traffic control devices have proven to be an effective method of improving safety and operations at railroad-highway grade crossings*. The agencies own figures revealed that upgrading from passive to automatic gates could be expected to result in an 85% reduction in accidents.

Automated gates are the safest device at grade crossings for two reasons. First, they tend to mask human error and otherwise dangerous conditions. For example, even though a motorist's sight line may be obstructed, automated gates would most likely stop that motorist from advancing through the crossing. The same can be said when there is inclement weather, failure of the train engineer to blow the warning devices on time, and overly-grown vegetation along either the railroad track or highway. Second, passive crossings require unrealistic *fail-safe* motorist behavior – something that is not assumed with automated gates. In a study undertaken in Tennessee by Dr. John E. Tidwell, Jr., Professor at the University of Tennessee, and published in that university's 1990 *Proceedings on Railroad-Highway Grade Crossing Research and Safety*, it was found that:

> *54 percent of the drivers contacted believe that if a crossing does not have a signal, it is rarely used by trains. This may affect the driving behavior of those drivers as they approach passive crossings. Drivers who believe that signals are placed at all crossings that are regularly used by trains would logically be expected to drive as if they had the right-of-way unless they see a flashing signal or a lowered gate.*

Obviously, the installation of automated gates at NS passive crossings could have been expected to eliminate a majority of the deaths and injuries at those crossings. Other savings from gated crossings would include the costs to the railroad, expenses incurred by local communities, the cost of damaged cargo, and possibly the catastrophic consequences of a major hazardous materials event.

7. THUS, THE PROPER BALANCE BETWEEN PUBLIC AND PRIVATE RESPONSIBILITY FOR GRADE-CROSSING SAFETY – ESPECIALLY WHEN IT INVOLVES A PRIVATELY-OWNED-AND-OPERATED INDUSTRY VESTED WITH A A [sic] PUBLIC RESPONSIBILITY – SHOULD NOT BE UNDERMINED BY OVER-STATING THE SCOPE OF LIMITED FEDERAL FUNDING.

NS's posture in regard to grade-crossing safety is consistent with its emphasis on cost cutting during the past two decades. The railroad seems to view grade crossings as an evil to be eliminated, and which otherwise should not require much in the way of railroad resources. After all, the NS's positions are that: (1) it is the government who should determine grade-crossing safety needs, (2) it is the government who should fund grade-crossing improvements, and (3) it is the motorist who is responsible for grade-crossing accidents.

The safety interest expressed by Congress would best be served by leaving in place a joint responsibility between the public highway authorities and the railroad

industry. This allows the tort system to provide the economic incentive for railroads fulfilling their safety obligations. Railroads would be expected to go beyond its more narrow and clearly-stated duties to follow Federal Railroad Administrator safety standards (which it is required by law to do), cut its vegetation, and provide relatively modest funds to help educate motorists. While well intended and certainly beneficial over past decades, federal aide to railroad grade-crossings has given a shield to the NS, and other railroads, to hide behind in denying its full safety responsibility at grade crossings. While the NS will install automated gates when it perceives an economic advantage from such action, clearly, NS's economic gains and safety at grade crossings are often mutually exclusive events.

Federal involvement in railroad grade-crossing safety is not an either or situation. It is the railroad that owns and operates the track structure as a commercial right-of-way, dissecting public roadways and inhibiting the efficient and safe movements of this country's populace. It is the railroad which passes each and every grade crossing daily. It is the railroad which can use pre-tax dollars to invest in grade-crossing safety and pass on some of its expenses to customers. It is the railroad which has a duty to the public which granted it eminent domain and a license to operate, to provide safe crossing of its track structure. And it is the railroad which shares crossing sites with public authorities.

NS's policy of denying responsibility for adequate grade-crossing safety and inappropriately relying on a limited public funding program not only leads to inadequate capital investment, maintenance, and personnel

levels related to grade crossings, it also breeds an overall staff attitude of ambivalence and negligence. The end result is a conscious disregard for the substantial risk to the taxpayers of death, injury, and property damage resulting from collisions and ensuing train derailments at our nation's gate [sic] crossings.

APPENDIX 12

TW Commentary

The Other Side of Staggers

BY HARVEY A. LEVINE

Conventional wisdom has it that the Staggers Rail Act of 1980 is hallowed legislation not to be tinkered with by Congress. After all, since Staggers, the railroad industry has eliminated its capital shortfall by increasing productivity, traffic and earnings. While the linkage between Staggers and the railroad turnaround is somewhat fuzzy, there is little doubt that the industry's newfound economic freedom has generated some benefits.

The other, and disturbing, side of Staggers is that it seems to have contributed to the antithesis of open-market behavior on which the legislation was based. For example, although one of the policies of Staggers is to avoid undue concentrations of market power, there has been a blatant movement toward such concentration. In 1980, the four largest Class 1 railroads accounted for 43 percent of total Class 1 traffic. following a series of mergers and acquisitions, in 1998 four mega-railroads accounted for 95 percent of the industry's traffic, with two each dominating half the country. This concentration is reminiscent of monopolistic power with the potential for market abuse.

A second example is that while Staggers required fair and expeditious regulatory decisions, the fair standard is questionable and there has been nothing expeditious about regulatory decisions. A case in point is the annual regulatory determination of railroad revenue inadequacy even while external capital literally chases railroad investment opportunities and railroad presidents boast to

their shareholders that earnings are more than adequate. This regulatory enigma should not be too surprising in that the Interstate Commerce Commission adopted a railroad inflation inde[illegible] the basis for general rate increases in 1980, only to flip-flop to an inflation-adjusted, or cost index, nine years later. During that period, railroad inflation increased by 50 percent while railroad costs declined by 11 percent.

Furthermore, the railroad cost methodology, market-dominance determination and maximum-rate standard have been engulfed in elongated proceedings. And finally, although Staggers was to provide a regulatory process which balances the needs of carriers, shippers and the public, railroads seemed to have gained the adversarial advantage in regulatory proceedings. The variations of railroad rate changes since Staggers has splintered shipper opinion. At the same tie, because of fewer and similar operations, railroads have strengthened their common resolve and have gained the financial resources to employ a delay-and-wear-them-down strategy. The result has been length and costly regulatory proceedings favoring the staying power of railroads.

To fully appreciate the current railroad policy environment, it must be understood that Staggers was more than a collection of technical provisions. Its findings, goals and policies combined to establish a mantra: hands off; let the market decide; and, when government is involved, err on the side of permissiveness. This message extended to the broad area of national transportation policy.

But has the free-market philosophy worked when railroads take positions which appear to be contrary to an industry with a public interest and responsibility? For example, under the pretense of being concerned about highway safety (not generally a railroad issue), railroads have been committed to stopping potential increases in truck capacity, admittedly in an effort to limit traffic diversion. And yet, railroads have denied responsibility for determining the need for, and the funding of, upgraded safety devices at their grade crossings. Instead, they choose to rely on a limited public program for such determinations and expenditures.

Railroads have declared that they want to be treated like all competitive industries in this country – except where they want to retain special public treatment such as antitrust immunity, work-stoppage protection and favoritism from bankruptcy provisions. [Picture Omitted In Printing] And finally, railroads have guarded their track structures as entitles for exclusive use and not subject to a private taking. But such a position doesn't come to grips with the public nature of their operations.

The combination of railroad market power, diminished regulatory effectiveness and adversarial advantage, can breed an industry arrogance not unlike William Vanderbilt's: "The public be damned." Consider the recent Association of American Railroads response to a judicial decision in which one of its members was ordered to pay a sizable sum of money to an injured plaintiff in a grade-crossing case: we didn't put the highway in, and frankly, we would prefer that it not be there.

Such an attitude, along with the other railroad positions identified above, raises the question as to whether the four mega-railroads are becoming like public utilities and the major telecommunications company in the 1950s. For if they are, their self-inflicted wounds could logically invite regulatory reform and/or public policies to increase market competition.

– Levine is a transportation economist and an independent consultant.

APPENDIX 13

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March 26, 1990

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TO ALL NARTC MEMBERS:

In December, 1989, the NARTC Executive Committee formed a "Special Advisory Committee On Grade Crossing Litigation" (consisting of the undersigned and John Bishoff of Chicago, Bill Brasher of St. Louis, Art Carmody of Shreveport, Charlie Clarke of Cleveland, Roy Farwell of Kansas City, Paul Hoferer of Topeka, George Pappas of Baltimore, and Bob Wolfe of Los Angeles) to demonstrate that claims based on the theory of a railroad's failure to provide additional grade crossing warning devices are preempted under federal law. These claims currently involve an annual industry-wide total payout of some $100,000,000.

Enclosed you will find the Committee's product, consisting of a summary report, a "punch list" of necessary items, a Model Trial Brief with form Affidavit, jury instructions, a background discussion of federal preemption, a number of unpublished decisions on the subject, and a listing of the various source materials, and where they can be obtained.

This effort was made possible not only by the hard work of the Committee, but also by the wonderful cooperation, work and contributions of many NARTC members, as well as the financial backing of the BN, C&NW, Conrail, CSX, KCS, IC, Norfolk-Southern, Santa Fe, SP and UP.

It is being supplied as a membership benefit for NARTC members *under NARTC copyright*, with the express understanding that *its use is limited to the defense of railroads in litigation,* and *for no other purpose.*

A word of *CAUTION* - - Be sure to read *all of the enclosed materials at or prior to the time you receive a crossing case,* as the first requirement of advancing the theory must be done when the complaint is answered.

We hope that the Committee's work will be of help to you in advancing the grade crossing warning preemption theory.

/s/ Stephen A. Trimble
Committee Chairman

DEPOSITION EXHIBIT #9 Shoemaker

NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL

Report Of The Special Advisory Committee
On Grade Crossing Litigation

FEDERAL PREEMPTION OF RAILROAD LIABILITY UNDER STATE LAW BASED ON SELECTION OF GRADE CROSSING WARNING DEVICES

March, 1990:

Following the ill-advised decision in *Karl v. Burlington Northern,* 880 F.2d 68 (8th Cir. 1989), which ignored many of the important facets of the preemptive effect of the Rail Safety Act of 1970 and the Highway Safety Act of 1973 (which placed on the states the requirement and duty to survey, plan and implement improvements to grade crossing warning devices), the NARTC Executive Committee, in December of 1989, authorized the establishment of the Special Advisory Committee On Grade Crossing Litigation. It charged the Committee to develop a position which could be used in trial and appellate courts, demonstrating that these Acts, and the Regulations issued thereunder, effected a complete preemption of state law which theretofore had imposed a duty (and thus liability for injury or death for negligence in connection therewith) on the railroads (whether on the basis of state statutes or common law), on the theory that such duty had been made the responsibility of those states receiving federal highway funds (*i.e.*, all of the states).

The Committee met, and decided that the best approach was to formulate a "Model Trial Brief," so as to provide the essential elements necessary for both the trial court and on appeal. At the same time, it was deemed sensible to also have a more detailed discussion of the various considerations involved. This led to the formulation of a separate "Background of Preemption," which would serve not only for educational/ appeal purposes, but also contain information for reply or rebuttal briefs in the trial courts.

The Committee realized that the "Model Brief" brief will be used in both federal and state courts (with judges having different levels of familiarity with the Acts, the doctrine of preemption, or the history of rail-highway grade crossings). Accordingly, the Committee decided (despite court rules or local practice invoke page limitations, *etc.*) to give fairly detailed treatment in the "Model Brief" because its purpose is to overturn the long-standing law in many states which allocated the duty and responsibility for grade crossing safety to the railroads. At the same time, *it realized that the trial lawyer is free to delete many of the details from the "Model Brief," or, if he so chooses, substitute pertinent portions from the "Background" in order to make the best case for the particular judge involved.* Thus, both documents should be carefully reviewed by the trial lawyer in order to know what is available to convince the courts of federal preemption under the applicable federal statutes and regulations, as well as the conforming statutes passed in many of the states.

The Committee has left to the trial lawyer the ultimate decision whether he should advance the preemption theory in a motion for summary judgment, a motion *in*

limine, or to use the same in objecting to the introduction of plaintiff's evidence of negligence at trial.

The Committee, while it worked hard and rapidly as possible to formulate the "Model Brief" and "Background," and to assemble the materials, makes no claim of originality, save in limited areas. Most of the materials were contributed by more than 60 NARTC members, who graciously responded to our call for H-E-L-P! They collected state statutes, briefs which they had filed, court opinions (both published and unpublished), and affidavits and depositions of state highway officials, which they sent to us, together with many helpful ideas and suggestions. The Committee acknowledges their significant contributions, which demonstrates the professional enthusiasm of NARTC's membership, as well as the valuable service which they render to the Nation's railroads.

Appended you will find photocopies of those documents and unpublished decisions which the Committee decided (at least for the present) would most often be attached as exhibits to the "Model Brief." You will also find the bibliography of materials (including virtually all state laws and regulations) which were reviewed in *connection with* this project. Those materials will be maintained at the NARTC office in California, and will be made available on request, save for the voluminous federal materials, which should be ordered from government sources.

ONE WORD OF CAUTION – – Please read the entire package *at the time when the case is brand new*. Not only will it suggest to you certain investigation and discovery, but it will ensure that you will present the *best* case on

preemption, not a half-hearted one wherein critical facts or legal theory are omitted. AND MOST IMPORTANTLY – – study the "Punch List" carefully, as it discusses a number of considerations which may well spell the difference between success and failure.

The Members of the Grade Crossing Committee are honored to have been selected for this task, and we hope that our efforts, and those of the many NARTC members who made contributions, will prove successful. Finally, we hope that if anyone has any questions on the subject, they will fell free to contact one of the Committee Members.

IN THE FUTURE – – Please forward copies of all trial and appellate court decisions *immediately* to the NARTC offices, so they may be circulated and added to the materials available for use by others.

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APPENDIX 14

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April 17, 1990

VIA FAX

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Re: Federal Preemption/Mahony v. CSXT

Dear Steve:

As we discussed, enclosed is our copy of Judge Murphy's Order on Reconsideration in the *Mahony* case. While he did not go as far as we would have like on the signal issue, at least he found a federal decision and thus preemption. On the speed issue, he reiterates his ruling that the question of reasonable speed is federally preempted. What he next does, however, is something that I frankly am perplexed about. He finds a factual issue sufficient to defeat summary judgment as to what was the maximum allowable federal speed, based solely on the testimony of the plaintiff's hired expert that his understanding "from his research in the area" is that the speed listed on the national DOT inventory sheet for this crossing is the maximum allowable speed. For reasons that we have simply been unable to run down in talking with state and federal DOT officials and railroad officials, for this particular crossing the speed was listed at 20 miles per hour. The judge, therefore, finds a factual dispute whether the maximum allowable federal speed is 20 miles

per hour or 40 or 60 based on federal regulations for class three and class four tracks respectively. Having found what he did on federal preemption, to-wit: that the speed is set by federal regulation, I don't see how he can find a factual issue on a matter of law based on a hired expert's understanding of his research. In any event, I am not concerned about ultimately showing that the maximum speed is set by federal regulation, and I am glad that he preserved his ruling on the federal preemption question.

Thanks for mentioning the session in Chicago, and I appreciate being included. I am, as you know, quite intrigued by the possibilities that preemption offers us and am very much of the view that it should be used aggressively with respect to issues, but extremely judicially with respect to cases. Just as in the *Mahony* and *Easterwood* cases, we knew we had good facts and good judges who are receptive to preemption arguments. Bad opinions can result from poor choices of cases in which to make the argument. Like Kenny Rogers' song says, "You gotta know when to hold 'em and know when to fold 'em."

As soon as we get the order in the *Easterwood* case, I will send that along to you.

Very truly yours,

/s/ Jack H. Senterfitt
Jack H. Senterfitt

JHS/br
Encl.
cc: Henry M. Moffatt, Esq. w/encl.

APPENDIX 15

IN THE DISTRICT COURT OF
LABETTE COUNTY, KANSAS

MIIKA M. MONOHON, and AMANDA L. MONOHON, A Minor, by and through their Mother and Natural Guardian, Janet I. Jackson, and JANET I. JACKSON, individually, and as Representative of the Estate of Dennis R. Monohon, Deceased,	)	No. 98 C 27 OS
Plaintiffs,	)	
vs.	)	
UNION PACIFIC RAILROAD CO.,	)	
Defendant.	)	

IN THE DISTRICT COURT OF
LABETTE COUNTY, KANSAS

JOMAIN E. ROUSER,	)	
Plaintiff,	)	
vs.	)	No. 97 C 32 OS
UNION PACIFIC RAILROAD CO., CHIRUND LAVA, M.D.,	)	
Defendants.	)	

AFFIDAVIT OF MERRICK C. WALTON

THE STATE OF TEXAS)
) ss:
COUNTY OF HARRIS)

Merrick C. Walton, being duly sworn, on oath states:

1. My name is Merrick C. Walton. I am of lawful age and otherwise competent to make this affidavit. I am an attorney employed by Union Pacific Railroad Company, holding the position of General Solicitor. My office is located in Houston, Harris County, Texas. I have been licensed to practice law in Texas since 1975, and I am also admitted to practice in certain federal jurisdictions.

2. I have been engaged in the representation of railroads in connection with the defense of personal injury litigation at various times and in various capacities since 1976. In 1989, I was appointed as a General Solicitor of Union Pacific Railroad Company. In that capacity, my responsibilities include directing the representation of other Union Pacific Railroad Company in-house and outside retained counsel in personal injury litigation including railroad grade crossing litigation.

3. I am currently a member of the National Association of Railroad Trial Counsel (NARTC) and have been a member for five years. I am Union Pacific Railroad Company's attorney member of the Special Advisory Committee on Grade Crossing Litigation (the "Committee"). As a member of the NARTC and the Committee, I have personal knowledge concerning the functions and activities of the NARTC.

4. The NARTC is a private non-profit organization limited to attorneys who are engaged in the defense of litigation affecting railroads. The NARTC headquarters is in Pacific Palisades, California, and its Executive Director

is Henry M. Moffat, a member of the State Bar of California since 1951. The organization periodically holds meetings throughout the country, wherein issues affecting railroads are presented to the attendees. The purpose of the meetings is to provide a forum for railroad trial counsel to privately, confidentially, and jointly discuss between themselves, and their railroad

* * *

APPENDIX 16

OLI LOGO AND NAME

[LOGO]
OPERATION LIFESAVER

Operation Lifesaver Presenter's Guide

Teen Curriculum

Section 3

What To Do

[Drawing of Car darting in Front of train]

What To Say

Teens

Many people think that most vehicle-train collisions happen at night. As a matter of fact, almost two thirds of all collisions at crossings occur in the daylight hours.

In one quarter of all highway-rail grade grossing collisions, the car runs into the side of the train!

Most Crossing collisions involve trains traveling under 35 miles per hour. Slowing down the trains would not eliminate collisions.

Over half of all such collisions occur at crossings equipped with automatic warning devices. Flashing red lights and gates don't eliminate collisions, either.

- Most fatalities occur within 25 miles of the driver's home. People seem to be lulled into carelessness by the many times they have crossed without seeing a train. We want you to remember the safety precautions to take at such crossings. A train may come by at the time from either direction. Trains today don't

move on regular schedules. Our slogan in Operation Lifesaver is "any time is train time."

Highway-rail grade crossing collisions happen to people of all ages. Teenagers and the elderly are involved, but so are all in between. The average age works out to be about 30 years of age, very near the national average, so we are all at risk.

Operation Lifesaver Presenter Trainer's Manual

Handout Level 1

Section 2 Pre-course Preparation

OPERATION LIFESAVER®, INC.
PRESENTER POLICIES and PROCEDURES

1) Any person who represents the state Operation Lifesaver program by making any any [sic] type of highway-rail grade crossing education presentation or who makes any type of Operation Lifesaver educational presentation must have attended and satisfactorily completed an approved Operation Lifesaver, Inc. certification program.

2) All Operation Lifesaver presentations in the state must be coordinated through the appropriate OL coordinator within the presenter's portion of the state. It is acceptable for OLI certified presenters to schedule OL presentations as long as the appropriate OL coordinator is aware of the presenter's activities and is in agreement with what is being scheduled. That way there should be no conflicts with other presentations being scheduled by the coordinator and/or other presenters in the area.

3) Each OLI certified presenter must keep in mind at all times, when making Operation Lifesaver presentations or other state activities, that they represent both Operation Lifesaver and their employer. Each presenter must understand that he/she is not a spokesperson for Operation Lifesaver, Inc. or the state Operation Lifesaver program, unless so designated by the state OL coordinator. The presenter's only responsibility is to deliver an Operation Lifesaver presentation as taught in the OLI presenter certification program. The presenter is not authorized to express his/her opinions or to discuss topics other than those specifically included in the Operation Lifesaver, Inc. Presenter's Guide.

4) Each presenter should be aware, at least two (2) weeks in advance, of any Operation Lifesaver presentation scheduled for him/her. It is the presenter's responsibility to prepare in advance, make arrangements to receive all necessary materials from the OL coordinator, and to deliver the presentation at the agreed-upon time and place. In the event of an emergency, it is the presenter's obligation to contact the OL coordinator as soon as possible so a replacement can be found. Depending on circumstances, a presenter who fails to show up for a scheduled presentation will be placed on probation by the sate OL coordinator. Repeated failure to deliver scheduled presentations could result in permanent suspension. Such steps are taken to insure the credibility of the state OL program and the national Operation Lifesaver Inc. Program.

Operation Lifesaver Presenter Trainer's Manual

Handout Level 1

Section 3 Introduction to Course

OPERATION LIFESAVER®, INC.

Operation Lifesaver®, Inc. is the designation used to identify the components making up the National Operation Lifesaver organization. Formed and incorporated as a 501 (c) 3 organization under IRS code in 1986, OLI is the national program established as a grass-roots program in 1972, and has *three* specific elements:

A) *BOARD OF DIRECTORS* – OLI is governed by an 11-member Board of Directors which is financially, legally and ethically responsible for all activities of the corporation. Board members represent coalition partners, such as highway, freight rails, short lines and suppliers, as well as the Chairman, Chairman-Elect and Immediate Past Chairman of the Program Development Council, OLI's program advisory group. The remaining board positions are at-large. Officers of the Board are: President, Vice President and Secretary/Treasurer. Current Board members are listed in the Operation Lifesaver Directory.

B) *PROGRAM DEVELOPMENT COUNCIL – PDC* – A special program advisory group was formed in 1987 to provide the volunteer manpower to suggest, guide and monitor all OLI programs. This council consists of 33 members who represent the varied areas of interest and input served by the Operation Lifesaver movement. Members include representatives from federal/state/local governments, highway-rail grade crossing supply companies, private safety associations (such as AAA and Amoco Motor Club), Class I freight railroads, Amtrak, Short Line and Regional railroads, law enforcement agencies (both public and

railroad) and State Operation Lifesaver Coordinators. PDC members are appointed by the President of the Board of Directors in cooperation with the Chairman of the PDC.

The PDC meets three (3) times a year, and works through a standing committee structure. Current standing committees, and some of the recent programs implemented through their leadership, are listed below:

1) *EDUCATIONAL RESOURCES COMMITTEE* – provides input and suggestions as to what materials are needed in the field. Reviews and assists with design of print and audio/visual materials.

2) *ENFORCEMENT COMMITTEE* – provides assistance and liaison for all activities such as *Officer on the Train* and *Grade Crossing Collision Investigation Courses.*

3) *ENGINEERING COMMITTEE* – provides liaison with all segments of the engineering community, serve as technical review board for OLI materials, and investigate and implement all programs deemed needed by state programs in the area of engineering.

POSITION STATEMENT

To enhance highway-rail grade crossing safety, Operation Lifesaver, Inc. endorses the concept of reducing the number of crossings through consolidation, elimination, grade separation and restricting the number of new crossings.

4) *PUBLIC RELATIONS COMMITTEE* – creates all public relations and media programs and helps in implementation.

5) *STATE ASSISTANCE COMMITTEE* – suggests programs which will assist states with local programs.

Surveys state OL Coordinators at least three times a year for input into programs, projects, concerns and suggestions to make the program stronger.

SAMPLE RESPONSES TO QUESTIONS

WHY AREN'T THERE GATES AND LIGHTS AT EVERY CROSSING?

Most people think that gates and lights are the answer to preventing tragedies at grade crossings. Unfortunately, these active warning devices often are not enough because drivers sometimes choose to disregard them; in fact, over half of all grade crossing crashes at public crossings occur where active warning devices (gates, lights, bells) exist.

Some crossings, where vehicular traffic is light, may only have one or two trains per week. At these crossings, it may not be cost-effective to install gates or lights. Decisions regarding appropriate types of warning devices needed at grade crossings are generally made by the state's highway officials.

THE GATES AT THAT PARTICULAR CROSSING ARE ALWAYS DOWN WHEN TRAINS ARE NOWHERE IN SIGHT. PEOPLE START TO BELIEVE THAT EVERY TIME THEY ARE DOWN, IT'S A MALFUNCTION.

I am not familiar with that specific crossing therefore I cannot speak directly to your question. You may want to contact the railroad. I can get you a number if you like.

Generally, if a motorist approaches a highway-rail grade crossing with an activated gate, he or she should heed the

warning. If the motorist believes the gate might be activated without a train present, the motorist should call his/her local law enforcement agency to report the incident. Under no circumstances should a motorist drive around a lowered gate unless a law enforcement or railroad official flags him/her through the crossing.

HINTS

- Avoid SPECIFIC-type questions and attempt to answer in GENERAL terms.

  EX: Operation lifesaver does not actively participate in the closure of specific crossings; however, Operation Lifesaver does *"endorse the CONCEPT of reducing the number of crossings through consolidation, elimination, grade separation and restricting the number of new crossings."*

  EX: Operation Lifesaver does not comment on the cause of any grade crossing crash; however, Operation Lifesaver does know that over 50 percent of the crashes that occur each year at public grade crossings, occur where active warning devices exits.

- DO NOT feel you need to answer every question asked of you. It is perfectly all right to say, "I do not know," and "I am really not in a position to discuss/comment on that specific issue. You should speak to _____." Attempt to have resource numbers handy.

- Above all else, use good judgment and discretion when responding. If a question makes you uncomfortable, then do not attempt to answer it. Remember you may always use the OLI toll-free number for referrals.

IMPORTANT WORDS AND PHRASES *TO USE* AND *NOT TO USE* WHEN REFERRING TO HIGHWAY-RAIL GRADE CROSSING SAFETY

When a roadway intersects a railway, it is a *highway-rail grade crossing*.

The term "railroad crossing" refers to an intersection where railroad tracks cross. "Highway" prefaces the phrase to emphasize the importance of the highway user in the grade crossing safety equation.

Crossings are *equipped* with either *active* or *passive warning devices*.

*A crossing is **NEVER protected/unprotected** or **guarded/unguarded**. This implies that crossings with gates, lights and bells somehow protect the motorist when in fact they are merely warning devices that are too often disregarded.*

When a vehicle and train collided, it is a *collision* or *crash* not an *accident*.

Avoiding the word "accident" is now standard in the highway safety industry, as the term implies that impact was unavoidable when in fact, the motorist could have prevented the collision by yielding the right of way to the train or paying closer attention.

* * *

APPENDIX 17

REGULATORY ISSUES – CROSSING SAFETY IN OREGON*

*Refereed Paper

Gregory A. Malkasian
Administrator, Transportation Safety Division
Oregon Public Utility Commission

PERCEPTION OF LIABILITY

The Oregon Public Utility Commission's (OPUC) perception of liability is based on experience and guidance. Experience from being co-defendants in cases and on guidance from legal counsel.

Oregon has been pro-active in crossing safety since 1968. Our activities in these matters have led to significant reductions in train-vehicle accidents at public crossings. In 1968, Oregon experienced 313 train-vehicle accidents which resulted in 26 fatalities and 67 injuries. In 1979, Oregon experienced 146 train-vehicle accidents which resulted in four fatalities and 28 injuries. Ten years later (1988), accidents dropped to 35, resulting in three fatalities and nine injuries.

Our legal counsel has assisted us in avoiding litigation and defended us in several legal matters. With open record laws, it is imperative that we adhere to a well established set of policies and procedures.

The OPUC has been named a co-defendant in several cases. Timeliness of implementing ordered crossing improvements often seem to be an issue. The obvious argument is that if the PUC had ordered crossing protection earlier, or required specific safety activities at the site, the accident would have been avoided. To reduce the

effect of this type of allegation, it is necessary to ensure cases are handled in a timely manner. This also requires timely follow-up to ensure compliance with the provisions of Commission orders. Our legal counsel has advised that we should have continuous documentation on all cases, including actions taken by staff in the attempt to resolve any contested issues.

During the course of processing an application for improvements at existing crossings, it a imperative that steady progress be made. If the matter stalls, for whatever reason, we must take appropriate action to resolve the matter. Sometimes this means that the matter is scheduled for a formal PUC hearing sooner than the parties would like.

Two liability cases may be of interest to you. One alleged that PUC failed to require installation of vehicle STOP signs at a crossing where STOP signs were not installed and an accident occurred. Staff had conducted a computer search of crossings meeting criteria showing possible benefit from installation of vehicle STOP signs. A letter recommending the installation as circulated to the appropriate public authorities. Actual installation was left to their discretion. Normally, the OPUC issues an order to perform specific functions rather than a permissive-type authority. Because this affected many crossings and road authorities, the permission was by letter. This case involved a public authority which decided NOT to install the recommended vehicle STOP signs. Since we did not require the public authority to install the STOP signs, staff did not check to determine whether the STOP signs were installed. We did inventory the protective devices at those crossings during our routine biannual

inspections. A fatal train-vehicle accident occurred at a county road grade crossing and OPUC was subsequently sued for not following up and requiring the installation of the STOP signs. We pleaded discretionary immunity and were ultimately dismissed from the lawsuit after depositions and other legal papers were filed. A major reason for our being dropped as a co-defendant was because staff has documented policies and procedures regarding railroad-highway crossings.

Another case involved an accident at a crossing where the processing of an application for crossing improvement was rather involved and protracted (NW 9th & Division Place). There was a long period while the parties were in contact, but nothing formal was filed in the docket. After the accident, plaintiff's attorney tried unsuccessfully to create an issue regarding our "lack of action." While the written record did not reflect it, staff had been in contact with the parties throughout the period. As it turned out, OPUC was dismissed from the case because the plaintiff did not file the suit within the statutory time limit.

Our experience with agency liability issues leads us to consider three areas.

1. **Follow established policies and procedures;**

2. **Insure that steady progress is made to resolve issues in a timely manner; and**

3. **Document and justify the agency's action throughout the process of resolving application cases.**

By following these steps, liability concerns have been mitigated by the OPUC.

OREGON'S PERCEPTION OF MAJOR REGULATORY ISSUES AFFECTING RAILROAD-HIGHWAY CROSSING SAFETY

ACCIDENT REPORTING

One issue of concern to us in the performance of our railroad-highway crossing activity is the state's inability to influence *accident reporting*. Prior to federal government intervention in the accident reporting area, railroads operating in our state cooperated with us by providing accident reports in a timely manner. They contained data elements very useful to us in analyzing accident causes. We conducted whatever type of review/investigation which was warranted. Our objective in accident analysis has always been to identify crossing safety actions that can reduce the likelihood of future accidents.

Since the federal government preempted state jurisdiction in the area of accident reporting, we no longer receive thorough accident reports in a useful format. This has hampered our efforts to analyze and review accidents as warranted. Receiving a sterile generic accident report, as much as 60 days after the accident, has limited value. The Federal Railroad Administration investigates few accidents. They simply collect and record data for statistical purposes. The federal preemption of state accident reporting does not give due consideration to valid state needs. We certainly do not object to uniform reporting requirements and the elimination of multiple reports, but

we strongly believe that the requirements should recognize and respond to the states' needs for accurate, timely information in a useful format.

FUNDING CONCERNS

The escalating cost of railroad charges to install crossing devices has been a concern to us for some time. Oregon law gives railroads the right to install equipment at crossings on their lines if they so choose. Many shortline railroads do not have signal departments. When they have a crossing signal project to install, they contract out the work. We have found that costs for similar projects installed by a contractor rather than railroad forces may differ by more than 150 percent. An installation that costs $35-50,000 if done by a contractor may cost $90-120,000 if installed by a Class I railroad.

When our concerns are voiced to the railroads on this matter, they cite labor union contracts as the culprit. While we believe labor costs do contribute to excessive costs, there are other factors to consider as well. Railroad overhead and equipment costs vary significantly from those in contracted jobs.

An additional concern is the time it takes a railroad to complete the installation. Currently, we are experiencing a 15-24 month period between the time a PUC order is signed and the job is completed. Signal suppliers tell us they can provide most equipment within 2-4 weeks of an equipment order. We believe a major contributing factor in installation delays is the railroads' reduction in their work forces. With fewer workers, the railroad must move

their gangs from longer distances between work locations, sometimes causing great delays. Fewer employees mean that more jobs are queued for longer periods before labor, equipment, and material can be assembled for a job.

We are also concerned about the transfer of Federal Section 130 crossing safety funds to high hazard elimination highway projects not related to crossings. When Section 130 funds became available, the federal government routed them through the various state departments of transportation. In the case of Oregon, this interjected another state governmental body into the process. The Oregon Department of Transportation (ODOT) sees the Section 130 funds as a means to help reduce the number of accidents on highways. Highway accidents far exceed the 35 to 45 grade crossing accidents experienced each year in Oregon. They find it difficult to rationalize expenditures of $100,000 at a crossing, which may have had one accident in the last ten years. We have seen several years in which up to 40 percent of the funds was used for high hazard elimination projects. During the last federal fiscal year 100 percent of the Section 130 funds was allocated to crossing projects.

In 1973, the State of Oregon established a fund called the State Grade Crossing Protection Account (GCPA). The purpose of this fund was to allow the state to bear part of the cost of crossing safety improvements in Oregon. The law provides for annual allocations of $600,000 from vehicle registration and driver licensing fees. We use the GCPA fund as the 10 percent match to the Section 130, 90 percent federal contribution in qualified crossing safety improvement projects. If a project does not qualify for

federal funding, the GCPA can fund 75 percent of a qualified crossing improvement project. The remaining 25 percent is shared 20 percent railroad and 5 percent public authority.

OTHER REGULATORY CONCERNS

While the OPUC is vested with the authority to close public grade crossings wherever possible, this is a very difficult task. Any crossing, regardless of the volume of highway traffic, is considered essential by its users. In our experience, any individual who uses a crossing believes adamantly that the crossing should remain open. In proposing the closure of an existing grade crossing, we accept that there will most likely be emotional and political opposition.

When we look at the potential of closing a public crossing, we try to address all concerns. We consider the amount of additional out-of-direction travel (circuity [sic]), the impact on emergency services (fire, police, and medical) to the area served by the crossing, and the impact closure will have on businesses. Generally, local politicians feel a need to represent their constituents' interests and oppose crossing closures.

RESPONSIBILITIES FOR CROSSING SAFETY IN OREGON

We believe the regulation and responsibility for public crossings should remain at the state level, not the federal or local level. State oversight provides sufficient insulation from local influences, yet provides expertise

close enough to understand the local nature of any problem. Regulation at the national level is not as responsive to local concerns.

In Oregon, exclusive jurisdiction for construction, alteration, and protection of railroad-highway crossings is the responsibility of the OPUC. This includes authorization of new public crossings and resolving disputes regarding existing public crossings. We also have the responsibility for establishing and maintaining a statewide crossing priority list which allows all crossing safety projects in Oregon to compete equally for public funds.

APPENDIX 18

AFFIDAVIT OF WM. H. WENDLING

STATE OF Virginia)
) ss
COUNTY OF Fairfax)

1. My name is Wm. H. Wendling, and I reside at HCR 71 Box 119, Camdenton, Missouri. I am self-employed as a consulting engineer specializing in roadside safety and crash reconstruction.

2. I completed a B.S. in Civil Engineering from Kansas State University, Manhattan, Kansas, in 1959. I completed several masters level classes in safety and traffic engineering at Northwestern University, Evanston, Illinois. I am a licensed professional engineer in the states of Kansas, Missouri, and Iowa.

3. From November, 1966 until June, 1992, I was employed by the Federal Highway Administration ("FHWA"). I am familiar with the basic organizational structure of the FHWA during this time period as well as the way in which the FHWA administered federal-aid projects and highway safety programs, including the identification and elimination of hazards at railroad crossings. During my tenure at the FHWA, the United States was divided into ten regions. Each regional FHWA office covered specific states, and the FHWA maintained "division" offices in each state. Region 5 covered the states of Nebraska, Missouri, Kansas, and Iowa. The implementation of the various federal-aid programs was based upon the conditions and requirements contained in the federal statutes and regulations that authorized the programs. The objectives, policies and practices of the

FHWA regarding the implementation of the various highway federal-aid programs was intended to be the same in each region and in each state.

4. I was an Area Engineer for the State of Nebraska from November, 1966 until February, 1987. In that position, I was familiar with and responsible for all aspects of the maintenance, engineering, and safety of the federal highway system within the State of Nebraska, including the administration of federal-aid projects and highway safety programs. From February, 1987 until June, 1992, I was the Regional Safety Program Engineer for the states of Kansas, Missouri, Iowa, and Nebraska, which comprised Region 5 of the Federal Highway Administration. As Regional Safety Program Engineer, I was familiar with and responsible for implementing federal highway safety programs in those states and for providing technical advice and training on safety issues.

5. During my tenure with the FHWA, the goals and objectives of the FHWA were communicated to each region through various forms of formal communication from the FHWA and the Department of Transportation in Washington, D.C. These written communications were in various forms, including the "Policy and Procedure Memorandum" ("PPM"), "Instructional Memorandum" ("IM"), Notices, and "Federal-Aid Highway Program Manual" ("FHPM"). It was the responsibility of the FHWA regional and state administrators and engineers to follow the policies, practices, procedures and instructions contained in these communications and directives, which expressed the goals and objectives of the United States Congress and the Secretary of Transportation of the United States Department of Transportation.

6. Prior to the Highway Safety Act of 1973, Congress had appropriated funding for crossing improvement projects to assist the states and the railroads regarding railroad-highway safety matters. However, funding was not available for crossings where the highway or road was "off-system," i.e. not a part of the federal highway system. This meant that there were thousands of railroad-highway crossings across the United States that did not qualify for nor receive federal assistance funds before the 1973 Act.

7. In enacting the Highway Safety Act of 1973, Congress and the FHWA intended and it was the stated goal of Congress that every public crossing in the United States, whether "on" or "off" the federal system, have crossing protection adequate to protect against the risks of that particular crossing. And, it was also the goal of Congress and the FHWA that every public crossing in the United States have a "minimum" level of protection regardless of the particular risks at each of those crossings. The only way to determine the adequacy of a particular crossing protection device for a particular crossing is to perform a site-specific engineering study and evaluation conducted by a "diagnostic team," which customarily is comprised of representatives of the railroad, the governmental agency which had jurisdiction over the road and the state agency, usually a department of transportation, public service commission, which had state responsibility for the crossing.

8. The implementation of the federal government's grade crossing safety program after the enactment of the 1973 Act was in two distinct phases. The first phase involved establishing a minimum level of protection at

every crossing in the United States each crossing, and once that was accomplished, the second phase involved going further and installing active warning devices where it was determined to be necessary by an engineering diagnostic evaluation. In July, 1974, each FHWA region received a copy of Federal-Aid Highway Program Manual, which is commonly known as FHPM 6-8-2-1. A true and accurate copy of FHPM 6-8-2-1 is attached as Exhibit 1. Under paragraph 6b, entitled "Establishment of Priorities", FHWA regional and state administrators and engineers were instructed that the it was immediately necessary to identify crossings which had no protective signs, such as crossbucks, or those which had nonstandard signs, and to insure that all public crossings be provided with signing and marking in compliance with the national standards contained in the Manual on Uniform Traffic Control Devices ("MUTCD"). The MUTCD described signing and pavement markings as "passive" traffic control devices. THE MUTCD, as well as the FHWA's directive in FHPM 6-8-2-1, considered the existence of well-maintained crossbucks to be a "minimum" warning device. The first phase of the grade crossing safety program was commonly known as the "Crossbucks Program" or sometimes referred to as the "Minimum Protection Program".

9. Attached to this Affidavit are copies of three memoranda: Exhibit 2, dated October 8, 1976, Exhibit 3, dated June 11, 1977, and Exhibit 4, dated October, 1978. These three documents are true and accurate copies of memoranda authored by the United States Government and distributed to the Regional Federal Highway Administrators pertaining to "signing and marking all public

railroad-highway grade crossings," which was designated by the government as a "Program Emphasis Area" for Fiscal Year 1977. I received these memoranda in my position as Area Engineer for Nebraska. I have personal knowledge of the policies described in the memoranda for the reason that I had direct responsibility for implementing the program described in these memoranda, which was the "Crossbucks Program" or "Minimum Protection Program."

10. Exhibit 2, dated October 8, 1976, was authored by the Offices of Engineering and Highway Safety and was directed to Regional Administrators of Regions 1 through 10 of the Federal Highway Administration. Each regional office distributed the memorandum to the "divisions" within the region, and as Area Engineer in the Nebraska division office, I received a copy from Region 5. The information contained in the memorandum had been previously available in prior communications to all regions and divisions. It was my understanding that the memorandum was issued because the FHWA was concerned that not enough progress had been made with the "Crossbucks Program" or "Minimum Protection Program."

11. As Area Engineer in charge of the Crossbucks Program for Nebraska, I worked directly with the railroads and with state officials in implementing this program. The railroads were involved with creating an inventory of crossings, including identifying crossings where there were nonstandard signs or no signs. In addition, the railroads performed the work necessary to bring the crossings up to a minimum level of protection, and

the railroads submitted invoices for their labor and materials, which were then reviewed by the states and then reviewed and approved by me. As Area Engineer, it was my understanding that all regions and divisions of the FHWA followed the same basic procedures in the implementation of the Crossbucks Program. In addition, when I was Regional Safety Program Engineer for Region 5 from 1987 until 1992, I had access to information from which I could see that the philosophy and implementation of the Crossbucks Program was the same in Missouri, Kansas, and Iowa as it was in Nebraska.

12. The divisions were encouraged to expedite the Crossbucks Program and to obtain the commitment of the states to provide this minimum level of protection, and this mandate is described in Exhibit 2. I recall hand delivering this memorandum to various state officials and discussing with them how this program would be implemented. In some cases, I may have mailed the memorandum to a state official with an attached letter discussing the program. My discussions with state officials included providing them with information regarding the various federal funds available for meeting this minimum requirement, and those funds are listed in Exhibit 2.

13. In addition to establishing a minimum level of protection, division officials of the FHWA encouraged the states, in cooperation with the railroads, to identify crossings that required more than minimum protection, and that information was maintained in the state's inventory of crossings. It was my understanding from the FHWA that Congress intended, in enacting the Highway Safety Act of 1973, that the states continue to evaluate crossings in order to determine the necessity of active warning

devices and the elimination of hazards. However, this second phase of the grade crossing safety program did not necessarily run concurrently with the Crossbucks Program, which commanded the initial efforts required under the 1973 Act to identify crossings which had either no crossbucks or nonstandard crossbucks and to ensure that all crossings had minimum, passive protection. During my tenure as Area Engineer for the State of Nebraska from 1966 until 1987, I was involved in the Crossbucks Program or Minimum Protection Program from its inception in 1973 until its completion in the State of Nebraska. The second phase of the 1973 Act, which was to identify crossings that needed more than minimum protection, continued up to, and was still in progress at, the time that I left my position with the FHWA in 1992.

14. In implementation of the Crossbucks Program, each division was required to submit monthly narrative reports to the FHWA Headquarters of the Office of Engineering and Safety to report on the status and progress of "signing and marking" all public grade crossings, and this requirement is referred to in Exhibit 2. I had this reporting responsibility for the State of Nebraska. Exhibit 3 is a memorandum dated June 11, 1977 to all Regional Federal Highway Administrators regarding deficiencies in the monthly narrative reports of the division officials. I received this memorandum in my capacity as Area Engineer.

15. The purpose of the monthly narrative reports was to show the number of crossings that had received the minimum, passive protection devices – crossbucks and advance warning signs. Exhibit 3 refers to different methods of reporting the data, and both methods

described public roads only. My monthly narrative report referred to "federal aid-system" roads and "off-system" roads, both of which were categories of public roads.

16. Exhibit 4 is a memorandum dated October, 1978 to all Regional Federal Highway Administrators that describes further reporting requirements for the monthly narrative reports. The memo emphasizes in paragraph 1 that the states were to give highest priority to the first phase of the Highway Safety Act of 1973, i.e. the Crossbucks Program.

17. The first phase of the 1973 Act, the Crossbucks Program, did not require nor did it expect that states would conduct diagnostic team evaluations on each crossing. States were simply required to identify crossings which either did not have minimum protection devices, or devices which were nonstandard. Therefore, it became common practice for the states to group large numbers of crossings into specific projects for upgrading with standardized, passive, minimum protection devices. The FHWA understood that the state projects were statewide, "corridor," or "segment" projects, including multiple crossings within each project, and that no specific diagnostic evaluation had been done by the state, the railroad or any local agency for the purpose of determining that the crossbucks were adequate protection for the risks and conditions of each crossing in the project. These large scale projects were meant to satisfy the first phase of the grade crossing safety program of establishing a "minimum level of protection," consisting of reflectorized crossbucks and pavement markings in compliance with the MUTCD, at all public crossings.

18. The second phase of the program, however, did require site-specific engineering evaluations to identify those crossings that required additional crossing protection, i.e. active warning devices such as flashing lights and gates. Prior to the Highway Safety Act of 1973, the FHWA offered assistance to the states and railroads in defining certain types of crossings which, because of specific conditions, required flashing lights and gate signals in order to provide protection adequate for the risks of those crossings. In a Notice dated March 20, 1973 directed to all regions, the FHWA encouraged the use of "automatic gates" at crossings and referred to PPM 21-10, a 1958 directive that defined certain conditions which required the installation of flashing lights and gates. The 1973 Notice amended this directive and indicated that special consideration should be given to using gates at crossings with the following seven characteristics: (1) high vehicle and train traffic volumes, (2) high train speed, (3) high approach vehicle speed, (4) moderately high combination of volume and speed, (5) usage by school buses and/or vehicles transporting hazardous materials, (6) other high hazard characteristics, such as continuing accident occurrences even though active protection devices are in place (flashing lights without gates), (7) crossings used by through trains where switching operations take place in proximity to the crossing." Attached as Exhibit 5 is a true copy of the 1973 Notice. The seven criteria were amended and codified on April 9, 1975 by the enactment of 23 C.F.R. § 646.214(b)(3)(i).

19. Federal funds were available to assist the states and the railroads in identifying crossings that needed more than the minimum protection afforded by passive

warning devices. The states and railroads requested and received reimbursement for engineering fees to determine the necessity of active warning devices and for the cost of labor and materials to install the active warning devices.

20. While federal funds were available both for the first phase Crossbucks Program or Minimum Protection Program and for the second phase that focused on additional warning protection, the two phases of the program were implemented independently of each other and were based upon completely different criteria and objectives. Approval of funds for the Crossbucks Program by the FHWA did not and was never intended to create a presumption that the FHWA determined that crossbucks were an adequate crossing protection device for the risks and conditions of a particular crossing. The FHWA's Crossbucks Program was focused on establishing a "minimum level of protection," which was never intended as a substitute for adequate protection.

In witness whereof, I place my signature this 15 day of January, 2000.

/s/ Wm. H. Wendling
Wm. H. Wendling, P.E.

Sworn to and subscribed before me this 15 day of January, 2000.

/s/ Eula F. Wolford
Notary Public

My Commission expires: 9-30-2000

EXHIBIT 1

Federal-Aid Highway Program Manual Vol. 6, Chap. 8
Transmittal 39, July 3, 1974 Sec. 2, Subsec. 1
Par. 6a(3)(c)2

2 Other Federal-Aid Routes.

a State system.

b Other (local roads and streets).

3 Non-Federal-Aid Routes.

a State system.

b Other (local roads and streets).

Where functional classification data is available, identification on that basis in addition to the above is desired.

(d) Guidelines to aid in determining the sections of highways to be sampled and making the survey are shown in Attachments 1 and 2.

b. Establishment of Priorities

(1) Railroad-Highway Grade Crossings (Section 203 of the Highway Safety Act of 1973).

(a) Section 203(a) of the Highway Safety Act of 1973 requires as a minimum that each State's schedule of improvements shall provide signs at all crossings. As a first priority each State, in cooperation with the involved railroad and any other agency having jurisdiction, shall identify those grade crossings at which there are either no signs or nonstandard signs and institute an improvement program to provide

signing and pavement marking in compliance with the Manual on Uniform Traffic Control Devices at all grade crossings.

(b) At least one-half of the funds authorized under Section 203 of the Highway Safety Act of 1973 are to be used for crossing warning devices (crossbuck warning signs, advance warning signs, pavement markings, illumination, flashing light signals with or without automatic gates). The remainder may be used for any type of work for the elimination of hazards of railroad-highway grade crossings.

[The remaining exhibits referenced were not legible and therefore were not included.]

APPENDIX 19

Rail-Highway Crossings

There are more than 220,000 public railroad-highway grade crossings in the United States at the present time. Approximately 49,000 of them are located on the Federal-aid system; 170,000 are off of it. Approximately 79,000 crossings are in urban areas; 144,000 are in rural areas. Only 48,500 (roughly 22%) have train-activated protective devices.

Each year some 12,000 motor vehicle-train collisions occur – an average of 32 a day. They result in 1,500 deaths and 7,000 injuries. Over 40% of these accidents happen at crossings where some active protection already exists, indicating that the solution to the grade-crossing problem involves both increasing protection and, where justified, separation or relocation.

The Committee, therefore, recommends that $150 million be authorized for appropriation for fiscal year 1974, and $225 million be provided for each of fiscal years 1975 and 1976 for railroad-highway grade crossing improvements. It is recommended that at least half of the funds should be utilized for installation of signing or train-actuated protection devices. Through such a multi-pronged approach, the Committee intends that every railroad crossing in America will be provided with modern, up-to-date, protection adequate to the risks of each such crossing.

APPENDIX 20

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF PIERCE — NORTHEAST JUDICIAL DISTRICT

Gene Graumann, personally and as Representative of the Estate of Trent J. Graumann, and Theresa Graumann,

Plaintiff,

vs. — File No. 98-C-2020

Burlington Northern Santa Fe Corporation a Delaware corporation d/b/a Burlington Northern & Santa Fe Railway Company; John Doe, Inc; And the Township of Hagel, North Dakota, a political subdivision,

Defendants.

The Deposition of SPENCER D. ARNDT, taken pursuant to Notice of Taking Deposition, taken before Michelle K. Pecharich, Registered Professional Reporter and Notary Public in and for the County of Hennepin, State of Minnesota, taken on the 15th of July, 1999, at 325 Cedar Street, Suite 600, St. Paul, Minnesota, commencing at approximately 9:53 a.m.

* * *

[p. 3] SPENCER D. ARNDT,

the Witness in the above-entitled matter, after having been first duly sworn, deposes and says as follows:

CROSS-EXAMINATION

BY MR. POTTROFF:

Q. Would you state your full name for the record, please.

A. Spencer Donald Arndt.

Q. And where are you currently employed?

A. Burlington Northern Santa Fe Railway Company.

Q. What's the title of your job there?

A. Manager of public projects.

Q. Has that changed from the time that you originally got the position, has the name changed on the job?

A. Not since I acquired the position in '95.

Q. At some point, was that called a coordinator of public projects?

A. Yes, it was.

Q. Would that have been before you took over?

A. Yes.

Q. Okay. Do you know who your immediate successor was to that position?

[p. 4] A. Joe Mooney.

Q. Does Joe still live here in Minnesota?

A. Someplace, yeah.

Q. Have you been in contact with Joe in the last couple of years?

A. No, I've maybe saw him once or twice. Saw him in a parking lot one time, he was going bowling someplace here in the Twin Cities.

Q. Last you knew he was residing in Roseville?

A. Roseville was the last place I know.

Q. And have you had any information come to your attention that would indicate he's moved from here?

A. No.

Q. Before we get too deep into your current position at Burlington Northern Santa Fe, let's talk about your background in railroading. When did you first take any employment, or have any business association with any railroad?

A. 1967, January.

Q. Would that have been after you got out of college?

A. Yes, it was.

Q. What was your degree in?

A. Architectural engineering.

Q. From Chicago Tech?

* * *

[p. 81] BY MR. POTTROFF:

Q. Have you gotten any information from any source that would tell you that those strips have a useful life that's limited?

MR. HILL: Objection to the form of the question.

THE WITNESS: I'd heard there was, I have never researched myself and done anything with it. I've just heard that there is a life, but I don't know what it is.

BY MR. POTTROFF:

Q. Okay. In all your years with the railroad, and you've spent a great number of years actually out in the roadmaster-type position, have you ever known any railroad to check the reflectivity on crossbucks?

A. No.

Q. Now, it's my understanding once those crossbucks are put up by the federal money administered through the state program, they become the property of the railroad?

A. That's correct.

Q. Have you historically worked in a position where you were in charge of either crews or supervisors that had to go out and put back up crossbucks that had been damaged or destroyed or stolen?

* * *

[p. 86] A. That's correct.

MR. HILL: Objection to the form of the question.

BY MR. POTTROFF:

Q. What happens when a crossbuck becomes nonreflective?

A. Don't know, never been involved in determining when one is nonreflective.

Q. That would – that's just never been something that's been a part of your job experience?

A. That's correct.

Q. Has anyone ever gone out and tried to show you how you can use headlights to determine whether a crossbuck is reflective or not?

A. They've never shown me.

Q. Have you seen that before?

A. Sure, I know what reflectivity is on a crossbuck.

Q. In fact, have you seen a old crossbuck put up against one of these new diamond grade crossbucks?

A. No, I've never had that comparison.

Q. Why is it, if you know, that road authorities will put a date on the replacement of signs?

MR. HILL: Objection to the form of the question. He has to speculate on what road authorities do

* * *

[p. 93] Q. Are you aware that they started using reflective materials in their refurbishing of cars?

A. I'm aware there is a program, I'm not aware of the details of the program.

Q. Do you know who – when that started or who would have been the person responsible for starting it?

A. I have no idea.

Q. Are you given any budget at all for the systematic replacement of crossbucks or other signs on the railroad that you feel have had their useful life expire?

A. Any budget dollars for any replacement, anything on a maintenance basis are actually the operating division's, maintenance division's responsibility not – not systems. They – they are responsible for maintenance and replacement, they have the budget to replace things that are knocked down or whatever they need to do.

Q. And those are the types of things we were talking about where sometimes signs will get knocked down, stolen or damaged?

A. Right.

Q. And the maintenance departments have the budget to put them back up, fix them or replace them?

A. That's correct.

Q. What I'm getting at is above and beyond those replacements of damaged signs, is there any policy that [p. 94] would provide for a system – systematic replacement of crossbucks as to if the reflective sheeting on it reached its useful life?

MR. HILL: Objection to the form of the question. You've changed it to now policy, before it was a line item in a budget.

THE WITNESS: No policy I'm aware of.

BY MR. POTTROFF:

Q. Have you ever been given any budget to start doing changes of the oldest reflective sheetings so that they are being changed out on a regular basis?

A. No, because the states have been doing it on their own.

Q. Well, when you say "the states have been doing it," what –

A. They've been ordering the crossbuck programs.

Q. So what the railroad relies upon is that the state will have a new crossbuck program at sometime in the future?

MR. HILL: Objection to the form of the question. Again, I hate to keep reasserting the State and Federal Preemption Doctrine but it must be done in this instance.

THE WITNESS: I don't know. I don't know that. We rely – again, the crossbuck was installed with [p. 95] federal dollars and the program has always seemed to revolve right behind replacement and appeared to be no need to do anything other than they were falling right behind in doing what they originally did in reinstalling.

BY MR. POTTROFF:

Q. So you don't believe, then, the railroad has a duty to maintain the reflective strips?

A. We didn't go out and check the reflectivity on it. So if we obviously were made aware of something, we would replace it.

Q. But as for maintenance to make sure they are reflective, you would never –

A. There was no established program.

Q. Okay.

MR. HILL: As you are pondering your question, do you want to try to have lunch now or do you want to just continue going? Whatever your pleasure is.

MR. POTTROFF: Actually that would be probably – I've got probably an hour left. I hate that because that's 15 minutes beyond when you were supposed to be at your conference call. Is it a conference that you can take and we can take a long enough lunch break?

THE WITNESS: I'll just tell them. Two other guys will be out, I just need to call them and tell them what I want them to cover, that's all.

* * *

[p. 107] Q. To give enough warning to the budget people –

A. Right.

Q. – and their bosses?

A. It's just a matter of programing it out so that it's there.

Q. As I understand, that program does not currently exist, though, where you set a date at which time you initiate changes to –

A. Right.

Q. – crossbucks? Okay. And I'm assuming that's one that you don't have the authority to initiate systemwide as the project manager over five states?

A. I don't know that I have the need to.

Q. Okay.

A. I don't even need to do it.

Q. Can you go out and replace crossbucks in a corridor without federal money?

MR. HILL: Objection to the form of the question, issues of federal preemption play into this, issues of state preemption play in, as well.

THE WITNESS: We would do it on a state basis.

BY MR. POTTROFF:

Q. And if indeed the person that came in and told you, hey, this crossbuck's not reflective anymore, came in [p. 108] and said, a hundred miles of crossbucks is not reflective anymore, same issue, they should be replaced?

A. You have to do something.

Q. Who would you have to get clearance from before you could go replace that many?

A. We'd have to budget funds and people to do it.

Q. That's not something that you are – your budget would handle, either under public projects or local maintenance?

A. It sounds like – what you are describing is more than a maintenance item, it's a – a major crossbuck replacement program, which is what the states do now.

Q. Correct.

A. They do that now for us.

Q. Have you ever had any contact with the township supervisors for Hagel County?

A. Yes, I have.

MR. HILL: Poor Jason, he has one chance, and you got a question.

BY MR. POTTROFF:

Q. What was the circumstances under which you had contact with the Hagel Township personnel?

A. They'd like to close the Main Street crossing.

Q. Main Street crossing in where?

A. Selz.

* * *

APPENDIX 21

AFFIDAVIT
of
ROBERT A. SCHUETZE

STATE OF COLORADO)
) SS AFFIDAVIT
CITY AND COUNTY OF DENVER)

1. My name is Robert A. Schuetze and I am over the age of 18 years. I am a duly licensed and practicing attorney in the State of Colorado. My office and mailing address is: 1600 Broadway, Suite 1600, Denver, CO 80202.

2. In the case of Prescott v. Burlington Northern Railroad Company, et al., District Court, County of Boulder, Colorado, Case No. 83-CV-0884-2, I obtained documents in discovery on behalf of the Plaintiff from the defendant, Burlington Northern Railroad Company. These documents are attached to this affidavit as follows:

Exhibit A. Burlington Northern Inc. Operations Department Circular No. 59.

Exhibit B. Burlington Northern Inc., Engineering Instruction Manual, Section 10.

Exhibit C. Burlington Northern, Letter by Willard L. Peck, Regional Counsel, Regarding 1981 Colorado Legislature, H.B. 1547 – concerning Railroads.

Exhibit D. Burlington Northern Memo, from D.H. Burns, Division Superintendent to W.L. Arntzen.

Exhibit E. Burlington Northern Memo, from W.L. Arntzen W.H. Ferryman, D.H. Burns and W.C. Doney.

3. These documents revealed certain corporate attitudes and beliefs. These documents were introduced into evidence at the trial of the above referenced case. Testimony of management personnel for the Burlington Northern Railroad Company at trial substantiated the corporate policies and attitudes of the railroad as contained in these documents.

VERIFICATION

BEFORE ME personally appeared Robert A. Schuetze who, being first duly sworn upon his oath, says that he is the affiant; that he has reviewed the foregoing statements, and knows the statements made therein to be true and correct to the best of his knowledge and belief.

/s/ Robert A. Schuetze
Affiant, Robert Schuetze

Colorado Bar Number: 8066

SUBSCRIBED AND SWORN to before me this 18th day of November, 1999.

My commission expires: 6-9-00

/s/ Illegible
NOTARY PUBLIC

4-21-72

BURLINGTON NORTHERN INC.
OPERATIONS DEPARTMENT CIRCULAR NO. 59

POLICY ON
PUBLIC GRADE CROSSING PROTECTION

In the interest of safety to the motoring public and its own operations, Burlington Northern will continue to support highway authorities at all levels for projects which reduce the hazards at highway-railroad crossings, and will increase its efforts toward the installation of automatic grade crossing protection where such installations can be justified. Regional Managers Engineering, in coordination with St. Paul Engineering Public Works Planning, will have prime responsibility for promotion and development of crossing safety improvement projects.

All concerned must be alert to the closing and elimination of grade crossings where possible. When improvements to an existing crossing and/or its protection is proposed by a highway authority particular attention must be given to other grade crossings in the area for possible elimination. Grade separations should be promoted if feasible and railway cost participation is consistent with federal aid project guidelines. The modernizing of outdated signals should receive high priority for potential crossing protection improvement projects. Considerations for a complete approach to a grade crossing elimination and crossing protection improvement program should include such fringe factors as corporate speed limits and blocking of crossings.

The motoring public is the principal beneficiary of projects which improve crossing safety, and financial support of such projects should so reflect.

On federal aid highways and secondary state highways utilizing federal funds, cost apportionment is normally on the basis of guidelines set by the Federal Highway Administration, and, in the case of a new crossing, there is no railway participation as the guidelines recognize no railway benefit. New grade crossings will be opposed unless definite need is established.

In most instances railway participation will be from 0 to 10% although in some states where funding is from the Grade Crossing Protection Fund, the assigned railway percentage continues to be greater. While BN will actively promote projects with the authorities having jurisdiction, such promotion must include an educational and selling effort on the relative benefits of the project as between railway and highway toward the end that railway funding does not exceed federal aid guidelines even though federal aid is not used.

Projects relating to the subject of this circular are to be planned for proper budgeting of BN funds and must be covered by authority through normal channels. Procedural handling of these types of projects are included in OD-31. The subject is covered in detail in Section 10 of the Engineering Instruction Manual.

/s/ I. C. Ethington
I. C. Ethington
Vice President, Operations

---

* * *

5. g. Billing for work by Railroad forces on Federal Aid, State Aid and/or PSC orders are based upon the agreement or PSC order, and is made periodically by the Accounting Department, as justified by any great expenditures. If progress bills are permitted, generally, they will be on the basis of engineer's estimate of percent work completed. Signal project progress billing is made when signal is placed in service – generally by percent agreed to in the agreement of total estimated cost.

h. Maintenance – we should pursue the direction to seek 100% public funding for installation and maintenance of grade crossing surfacing, grade crossing traffic control systems, overhead separations, and underpass separations except track structure maintenance.

(1) Grade crossings – in general, we are obligated to maintain the roadway over the track or tracks to about 6 inches beyond the ties.

(2) Active traffic control systems – the railway generally assumes maintenance costs, but many states are now participating in these costs on a percentage basis of AAR unit cost. We must pursue this direction to seek 100% AAR unit cost participation in all states.

(3) Separations – we are working toward the principle that the road

authority should maintain all overhead bridges and all underpass bridges (Railroad Bridges) except track structure. Previous obligations or statutes might require railroad participation. We should attempt to change these statutes, especially when these structures come up for renewal or modifications.

* * *

---

* * *

3. Flashing light signals are used on two-lane roadway where conditions in (1) are not present.

(Refer to Grade Crossing Protection Guidelines – Section 2).

V. Reimbursement.

A few of the projects are not carried to completion and when this occurs, the Railway Company receives no direct reimbursement. In these instances, however, we are the gainer in that we may have avoided expenditures for installation and maintenance.

The projects that do go forward can generally be classed as a Federal Aid project or a Non-Federal Aid project.

a. Federal Aid projects involve work on Interstate, primary, secondary and urban highways and in these instances we must use Federal Highway Administration Memorandums as guides. PPM 21-10 covers "Elimination of Hazards of Railway-Highway Crossings", PPM 30-3 covers "Reimbursement for Railroad Work", and PPM 20-12 covers "Railway Protective Liability Policy".

   In general, the State Highway Department initiates and carries out projects on Federal Aid routes, however, in some cases the County may have jurisdiction over a few secondary routes.

   The PPM guidelines are rather fair in assignment of Railway Company benefits as, for instance, they do not provide for Railway Company participation in projects involving new roads and assign a maximum of 5% of the cost to the Railway Company if a crossing is eliminated when a new separation is built. The Railway Company need not participate on a signal project on an existing crossing or on a new crossing.

   Reimbursement basis for railway work on Federal Aid projects has been revised to provide for use of General Manager Association (GMA) rates for roadway machines. Improvements are not betterments if required solely for highway changes. (Such as relay through crossing area only). Refer to reimbursement guidelines for use on Federal Aid projects (Attachment #2).

b. Non-Federal Aid projects – we should attempt to use Federal Aid guidelines insofar as possible in connection with Railway

Company participation and reimbursement in any project.

Our participation may be determined for us though application of more restrictive State statutes or where terms of covering ordinances or agreements would govern.

* * *

SUGGESTED GRADE CROSSING PROTECTION GUIDELINES

(For New Installations or
Where Replacements are Involved)

I. *Passive Protection or Non-automatic*

1. Crossbucks – reflectorized.

   Driver determines whether or not there are train movements for which he should stop.

2. Visibility restrictions may not allow the driver to make the proper determination and stop signs could supplement crossbucks. Such use should be restricted to cases where lower vehicular volumes and lower highway speeds are involved. Highway authority is required and they should furnish and place stop signs. In some cases Public Service Commission approval required.

3. Illumination of grade crossing may be desirable, particularly where night trains are involved and if train operations are such as to block crossing through slow speeds or switching operations and where the highway profile is such that opposing

vehicular headlights are visible under or over railroad cars. As such, this should be considered as a roadway lighting project to be installed by the road authority. Refer to AREA Manual Chapter 9, Part 5, for guidance. Illumination should not be used in lieu of installing automatic protection.

II. *Active Protection or Automatic*

1. Where studies indicate the *need* of grade crossing protection beyond that provided by signs or illumination (flood lighting), automatic protection should be installed which will provide advance warning to the motorist of the approach and passage of trains.

2. Train operations and/or signal *controls* should be such as to provide adequate protection and to minimize unnecessary or undue operation of signals. A 20 second minimum warning time is standard. Track circuits, speed and motion detectors and cutouts may be involved.

3. *Types* of automatic protection are wigwags and flashing light signals with or without gate arms. (Cantilevers are of the flashing light type).

4. *Classification* of Signals

   A. *Wigwag*

      Train approach indication given by horizontally swinging disc and a red light enclosed in the disc.

   B. *Flashing Light Signal*

      Train approach indication given by two horizontal red lights flashing alternately at predetermined intervals. (In Minnesota, the

Public Service Commission may also require a rotating stop disc.)

* * *

BURLINGTON NORTHERN

John L. Pilon
Assistant Regional Counsel

James P. Gatlin
Attorney

Willard L. Peck
Regional Counsel

March 11, 1981

Messrs. Samuel R. Freeman
Patrick A. Grant
Michael J. Wadle
Leo S. Altman

Re: 1981 Colorado Legislature
H.B. 1547 – Concerning Railroads

Gentlemen:

Enclosed is a copy of the above bill which would amend the Colorado Public Utility Law relating to grade crossings.

The first substantial change appears on page 2, line 11, where the minimum amount to be paid by a railroad in connection with the installation of signals under the Grade Crossing Protection Fund shall be 50% rather than 10%. The other change is on page 4 relating to the general jurisdiction of the Commission over grade separations, etc., where language is added to require that the railroad

shall pay not less than 50% of the total cost. Under existing law there is no limitation, and the allocation of costs is within the discretion of the Commission.

In addition to Representative Mielke, other sponsors are Representatives Hudson and Reeves, and Senators Schaefer and Nobel.

This is not entirely unexpected since I have had numerous conversations with both Representative Reeves and Senator Nobel on this subject, and this obviously is a result of their concern and an easy way out.

I also have direct information that the Legislative Council has been studying the Nebraska ton mile tax law on railroads, which you will recall that the Attorney General's office several years ago gave an informal opinion that such a tax would be unconstitutional in Colorado.

We will, of course, watch this matter very closely, and I believe we should be ready to present testimony if this bill does get any backing.

It would be appreciated if all concerned could immediately assemble any information that can be used in opposition, and furnish the same to Mr. Witherall for his use in opposing this bill.

Yours very truly,

W. L. Peck
Regional Counsel

WLP:gk
Encl.

cc: Mr. Richard F. Witherall

bcc: Messrs. A. E. Michon
W. L. Arntzem
J. R. Walker
H. C. Kimbrough
W. H. Ferryman
J. E. Daume

My first impression is that our basic argument will be that each crossing presents a different situation, and that discretion should be left to the PUC to determine the percentages to be applied. Obviously there are places where need for signals or grade separations are not needed because of the railroad but because of increased automobile traffic, etc. Any additional arguments would be greatly appreciated.

W.L.P.

Denver, Colorado
March 18, 1981
File: O-410 (D-0318)

Mr. W. L. Arntzen:

Please refer to your letter of March 13, 1981, File 117-2, concerning 1981 Colorado Legislature H. R. 1547 which would amend the Colorado Public Utilities Law relating to grade crossings. We have reviewed the proposed Bill and listed below are arguments we think could be included in our effort to defeat this proposed Bill:

(1) Historically, the railroads were here before the automobile. The automobile was developed after the railroad rights-of-way were

established and, consequently, crossings were put in subsequent to the railroads' inception.

(2) There are more automobiles than trains. Inasmuch, it is more a matter of highway safety and should therefore be paid from highway taxes and not railroad monies.

(3) Disregard for highway laws is the cause for the majority of highway-railroad crossing accidents. Although I do not have the statistics available, it is readily apparent that disregard for present laws and lack of enforcement of present laws contribute to the grade crossing problem.

Although various positions may be taken considering this very important point, it is hoped that the above suggestions will help to defeat the proposed Bill.

/s/ D. H. Burns
D. H. Burns
Division Superintendent

Denver, CO
March 13, 1981

File: 117-2

Betty – Letter on Tape DGA

Messrs. W. H. Ferryman
D. H. Burns
W. C. Doney

Attached is copy of Mr. W. L. Peck's letter of March 11 concerning 1981 Colorado Legislature H.B. 1547 which would amend the Colorado Public Utilities law relating to

grade crossings. We certainly want to do everything we can to defeat this proposed legislation which would compel the railroad to pay 50% of the cost of grade crossing protection and grade separations.

It would be appreciated if you would review the proposed bill and provide any argument that would seem appropriate to use in defeating this proposed bill.

W. L. Arntzen

Jan 28 2000

(13)

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-312

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF KENNETH W. HEATHINGTON, PH.D., P.E., GARY LONG, PH.D., P.E. AND HOWARD L. ANDERSON IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Amici are Transportation Engineers with an interest in railroad grade crossing safety. They are familiar with the practice of transportation engineering as it relates to grade crossing safety and have studied the technical materials available. They are well aware of the great risk of serious injury or death when the collisions occur between trains and motor vehicles. They are aware of the methods available to reduce this risk of serious injury or death. They are also aware of the limitations of some of those devices.

Kenneth W. Heathington, Ph.D., P.E. is a transportation engineer with a Ph.D. from Northwestern University in Civil Engineering (Transportation Planning) and a registered professional engineer. He was a professor of civil engineering emphasizing transportation planning at The University of Tennessee from 1972 until his retirement in 1992. He acted as president and also served as a member of the board of directors of The University of Tennessee Research Corporation. While with the University he oversaw research projects for the U.S. Department of Transportation, Federal Highway Administration including, "Innovative Railroad-Highway Crossing Active Warning Devices" and an "In Depth Accident Investigation". He has authored over one hundred-fifty papers dealing with transportation issues a substantial number of which dealt specifically with railroad/highway grade crossing safety. He is now a private consultant. A complete copy of Dr. Heathington's CV is attached to the affidavit he has filed in this case.

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[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and their counsel made any monetary contribution to the preparation or submission of this brief. The letters granting this consent is attached as exhibit to this brief.

Gary Long, Ph.D., P.E. is a transportation engineer with a Ph.D. in transportation engineering from Texas A & M University and a registered professional engineer. He has been a professor of civil engineering at the University of Florida since 1977 and has been the Transportation Coordinator for the Department of Civil Engineering. He has served as the Special Advisor to the Assistant Secretary of the Florida Department of Transportation. He has received the Technical Council Award and Certificate of Accomplishment for Outstanding Service from the Institute of Transportation Engineers and the Past Presidents' Award from the Institute of Traffic Engineers. He is the author of over 50 technical publications and has made numerous presentations concerning Transportation Engineering. He has been invited to testify before the NTSB on railroad grade crossing safety, and is currently the principal investigator on a research project sponsored by the Florida DOT on Track Clearance Time Requirements at Railroad-Preempted Traffic Signals.

Howard L. Anderson, has a B.S. in Civil Engineering from the University of California at Berkeley. He was with the Federal Highway Administration from 1954 until his retirement. He has made numerous presentations regarding transportation engineering generally and railroad grade crossing specifically. He was largely responsible for making federal funding available in 1970 and 1980 to bring railroad grade crossings into minimum compliance with the MUTCD. For his work he received the Superior Achievement Award from the FHWA and the Distinguished Service Award for Safety from the National Safety Council.

SUMMARY OF THE ARGUMENT

When federal preemption is used as a defense to a tort action, the desired effect is immunity from liability. It means immunity regardless of the egregiousness of the

tortfeasor's conduct or the magnitude of the harm. Common law tort liability is an important part of our jurisprudence. It provides a vehicle for accountability and responsibility that has existed in civilized society, in one form or another, for millennia. It addresses preventable events and assigns responsibility. Potential liability in tort provides a strong incentive to prevent the occurrence of the harm. Not infrequently, one reason for imposing liability is the deliberate purpose of providing that incentive.

The mere expenditure of federal funds, by itself, cannot abrogate over a century of common law. It is one thing to find preemption of state common law rights when the federal government "mandates" that particular warning devices be in place prior to opening a grade crossing to motorists. It defies common sense and the clear presumption against preemption to destroy an otherwise valid common law negligence claim simply based on the expenditure of federal funds.

The two-part test for preemption in grade crossing cases should require the party claiming it to: **(1)** establish whether subsection (b)(3) or (4) of 23 C.F.R. § 646.214 applies at all (i.e., whether federal funding participated in the installation of warning devices at the crossing in question); and **(2)** establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.

If the railroad's common law duty is removed before there is a determination concerning the adequacy of the protection at a given crossing **and** before the proper protective devices are in place, **who will be responsible for safety at the crossing?**

We have known for most of the last 70 years that the most effective method of warning motorists of the approach of a train is through active signals at the crossing. We have known for years that train whistles and headlights are not effective warning devices. A train going only 20 miles per hour takes over a quarter of a mile to stop. A train going 60 miles per hour takes almost two **miles** to stop! When the train's engineer tries to make an emergency stop, 5 to 15 seconds will elapse before the brakes become effective. Motorists in automobile/train collisions are 40 times more likely to be seriously injured or killed than they would be in a collision with a motor vehicle. For the last 35 years, every study conducted concerning the death and human tragedy suffered at railroad crossings has consistently shown that the presence of active warning devices significantly reduces the rate of serious injury or death at those crossings.

ARGUMENT

I. THE IMPACT OF FEDERAL PREEMPTION ON VALID COMMON LAW ACTIONS FOR NEGLIGENCE.

When federal preemption is used as a defense to a tort action, the desired effect is immunity from liability. It means immunity regardless of the egregiousness of the tortfeasor's conduct or the magnitude of the harm. We cannot lose sight of the fact that the practical effect of finding a state common law negligence claim preempted by federal law is to excuse a wrongdoer from accountability for its actions.

Common law tort liability is an important part of our jurisprudence. It provides a vehicle for accountability and responsibility that has existed in civilized society, in one form or another, for millennia. It addresses preventable events and assigns responsibility based on both the magnitude of the loss and the tortfeasor's ability to prevent it.

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.[2]

Norfolk Southern's position here is little different from Medtronic's in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

> Under Medtronic's view of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device. Moreover, because there is no explicit private cause of action against manufacturers contained in the MDA, and no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective medical devices. n7 Medtronic's construction of § 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order "to provide for the safety and effectiveness of medical devices intended for human use," 90 Stat. 539 (preamble to Act). It is, to say the least, **"difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct,"**

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[2] Prosser and Keeton, *The Law of Torts, Fifth Edition*, West Publishing (1984)

> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984), and it would take language much plainer than the text of § 360k to convince us that Congress intended that result.[3] (Emphasis supplied)

The position advocated by Norfolk Southern and its amici is that immunity from responsibility should occur any time there is any federal action in a given area. They seek an abolition of more than 100 years of common law concerning railroad grade crossing safety and this Court's long standing presumption against preemption. This is incorrect and constitutionally impermissible.

> Here, however, Medtronic's sweeping interpretation of the statute would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the Lohrs' alleged injuries.[4]

Neither CSX's defense in *Easterwood* nor Norfolk Southern's defense in this case was predicated on their conduct or on the conduct of each respective plaintiff. Each contended that over a century of common law should be erased because the federal government decided to use federal tax dollars to deal with a problem the railroad failed to address, grade crossing safety. The fact that FHWA chose to exercise good stewardship of the taxpayers' money and develop a rational plan to analyze the hazard level of individual crossings should not be available to excuse a tortfeasor from responsibility for the harm it caused.

II. THE ISSUE.

When this Court decided *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 123 L. Ed. 2d 389, 113 S. Ct. 1732

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[3] *Lohr*, 518 U.S. 487, 116 S. Ct. at 2251.

[4] *Id.* 518 U.S. 488-89, 116 S. Ct. at 2252.

(1993), it made it quite clear that the **only** source for federal preemption of common law claims concerning the adequacy of the protection at a railroad grade crossing was 23 C.F.R. §§ 646.214(b)(3) and (4).

> The remaining potential sources of preemption are the provisions of 23 CFR Sections 646.214(b)(3) and (4), which unlike the foregoing provisions, do establish **requirements** as to the installation of **particular** warning devices.
>
> * * *
>
> As discussed supra, at 666-667, under §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds "participate in the installation of the [warning] devices." Thus, unlike the Manual, §§ 646.214(b)(3) and (4) displace state and private decision-making authority by establishing a federal-law requirement that **certain protective devices be installed or federal approval obtained**. (Emphasis supplied)[5]

This is consistent with this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) finding preemption of common law failure to warn claims where Congress " . . . prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels or in cigarette advertisements." Where the federal government "mandates" that particular warning devices be in place prior to opening a grade crossing to motorists, state common law cannot find fault for failing to use something else.

The dispute is centered on the following conclusion to this section of the Court's opinion:

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[5] 123 L. Ed. at 400, 113 S. Ct. at 1741.

> In short, for projects in which **federal funds participate** in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings. 113 S. Ct. at 1741.

The railroads, however, have taken the phrase "federal funds participate" and stretched it beyond its logic and context. Since *Easterwood*, the railroads have argued, as Norfolk Southern does in this case, that the only question to be asked and answered in a railroad crossing case is whether "federal funds participated" in any crossing improvement, and they argue that if the answer to that question is answered in the affirmative, federal preemption applies. The railroads have argued, as the Norfolk Southern argues herein, that federal preemption applies regardless of whether or not a crossing has 23 C.F.R. § 646.214(b)(3) characteristics and regardless of whether the crossing ever had an engineering evaluation to determine whether any particular crossing protection device was adequate for the risks of that particular crossing.

This argument ignores the history of legislation and regulations designed to improve railroad-crossing safety. It ignores the fact that during the 1970's and 1980's two different programs, administered by the FHWA, addressed the deficiencies known to exist at grade crossings. In addition to federal funds earmarked for installing flashing lights and gates at crossings where specific engineering evaluations had concluded that such devices were necessary, the 1973 Federal-Aid Highway Act, section 203 provided the funding and encouragement to identify crossings which had no passive devices, such as

crossbucks, or had passive devices which did not conform with uniform national standards. The intent of section 203 was to bring all crossings in the country up to minimum protection levels, which meant that all crossings should have passive signs and markings which complied with the national standards of the *Manual on Uniform Traffic Control Devices* (MUTCD) regardless of site-specific conditions. This program did not require an engineering evaluation of each crossing, nor did it require a determination of whether a particular type of crossing protection device was adequate for the specific risks at the individual crossing, even though federal funds may have been used to assist the states in bringing certain crossings up to these minimum levels of protection. It is difficult, if not impossible, to find a public crossing in the United States that did not receive at least one dollar of federal funding under this minimum protection program. Accepting the railroad's simplistic interpretation of the language of the *Easterwood* case, their "bright line" becomes nothing more than a dark cloud behind which hides its attempt to gain total immunity for every crossing fatality that occurs in this country.

When the phrase "federal funds participate" in the installation of warning devices is made in the context of 23 C.F.R. §§ 646.214(b)(3) and (4), it makes sense. The regulation provided that where federal funds participate in a crossing *meeting the criteria of the regulation*, flashing lights and gates would be required, unless something less was specifically approved at a particular crossing. Just as an engineering analysis is necessary to determine that flashing lights and gates are required at a specific crossing under 646.214, so should an analysis be required that they are not. To think or argue to the contrary is to ignore sound principles of engineering and traffic safety. The unassailable fact remains that passive devices, such as crossbucks or pavement markers, are not necessarily adequate to protect the public from the risks of all railroad

crossings regardless of who has contributed to their installation. Adequacy can only be determined by an engineering analysis and evaluation of the site-specific conditions at each crossing. The minimum protection afforded by a crossbuck or pavement marker has never been considered under any traffic or engineering principle to be adequate protection without such an analysis. The Norfolk Southern, and their amici, however, wish this Court to ignore these fundamental principles.

It is the dispute over the interpretation of the *Easterwood* opinion with a myriad of decisions both in the federal and state courts that led this Court to grant certiorari in this case.

III. THE SIXTH CIRCUIT'S DECISION IN *SHANKLIN* IS CONSISTENT WITH *EASTERWOOD* AND THE STRONG PRESUMPTION AGAINST PREEMPTION.

The opinions of Judge Batchelder in *Shanklin*[6] and Judge Posner in *Shots*[7] represent the better-reasoned analysis of this Court's decision in *Easterwood*, as well as its historical reticence to preempt state common law.

A. The Two-Part Test to Finding Preemption in Railroad Grade Crossing Cases.

Judge Batchelder correctly observes that the major difference between Judge Posner's examination of *Easterwood* and courts with a contrary view was that others found the mere fact of "federal funding" was sufficient to find preemption:

> The Fifth, Eighth, and Tenth Circuits have each interpreted Easterwood to hold that federal

[6] *Shanklin v. Norfolk Southern Railroad Company*, 173 F.3d 386 (6th Cir. 1999)

[7] *Shots v. CSX Transp.*, 38 F.3d 304 (7th Cir. 1994)

> funding is both a necessary and a sufficient condition for the preemption of state law.
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> * * *
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> The Shots Court framed the discussion by first asking "what if anything more must be shown besides federal financial assistance to knock out a state common law or statutory safety requirement for grade crossings . . . ." *Id.* at 305. Judge Posner, writing for the Seventh Circuit in Shots, found it significant that the Easterwood Court never got around to enumerating additional requirements for preemption, because the threshold requirement, federal funding, was absent in that case. *Id.* at 307. **Judge Posner correctly noted that there is a difference between holding that federal funding is a necessary condition to preemption and holding that federal funding is a sufficient condition.** *Id.*[8] (Emphasis supplied)

Judge Batchelder and the Sixth Circuit concluded that Judge Posner's analysis was the correct one. Clearly, preemption could occur under 23 C.F.R. §§ 646.214(b)(3) and (4) because that regulation, when it came into play, mandated the use of certain devices. The fact of federal funding is significant in the context of this regulation, because **before** federal funds could be approved on a project funded under this regulation, lights and gates had to be **installed and working.**

> (2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by

[8] 173 F.3d at 391

> FHWA until adequate warning devices for the crossing are installed and functioning properly. 23 C.F.R. § 646.214(b)(2)

Conversely, if something **less** than lights and gates could be used, there had to be a finding that something less was adequate. This Court never had occasion to address the steps necessary to find preemption under 23 C.F.R. §§ 646.214(b)(3) and (4) in *Easterwood* because the crossing at issue in that case did not make it past the first step, which was federal funding.

> Because the Supreme Court in Easterwood found that federal funds had not participated in the project at issue in that case, it had no occasion to consider the application of the regulation to particular crossings.[9]

The Sixth Circuit used Judge Posner's analysis to formulate a two-part test for finding preemption pursuant to 646.214(b)(3) and (4). That test is consistent with *Easterwood,* and the clear presumption against preemption:

> Thus, the Seventh Circuit in Shots announced a two-part test for preemption in grade crossing cases: **(1)** establish whether subsection (b)(3) or (4) applies at all (i.e., whether federal funding participated in the installation of warning devices at the crossing in question); and **(2)** establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.[10] (Emphasis supplied)

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[9] 173 F.3d at 392 citing *Shots*, 38 F.3d at 307

[10] 173 F.3d at 393

B. The "Fiction of Constructive Approval" is Contrary to the Presumption Against Preemption.

Judge Batchelder describes preemption based solely on proof that federal funds participated in the project as the "fiction of constructive approval." Again, she has gone directly to the heart of the difference between the analysis of the Sixth and Seventh Circuit, and that utilized by the courts holding " . . . that federal funding is the equivalent of a determination that the devices being funded are adequate protection at a particular crossing."[11]

> To characterize the happenstance method by which FHWA funds were approved for the [safety measures in question] as an act which triggered preemption is to ignore, it seems, the whole point of the Easterwood doctrine . . . It makes no sense to find that the railroad has been excused from its common law duty to maintain safe crossings simply because, without any analysis by anyone regarding what devices were required at [the particular crossing] under the federal regulatory scheme, FHWA signed off on a request for funds, a portion of which came to be applied to defray the cost to the county of installing these [safety measures].[12]

Any other conclusion defies common sense and this Court's instruction regarding federal preemption. The criteria laid out by this Court in *Lohr* require that any preemption analysis concerning valid common law claims starts with two basic assumptions:

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-

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[11] 173 F.3d at 393

[12] *Id.*

empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Ibid.; *Hillsborough Cty.*, 471 U.S. at 715-716; cf. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the scope of its intended invalidation of state law, see *Cipollone*, 505 U.S. at 545-546 (SCALIA, J., concurring in judgment in part and dissenting in part), we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. *Id.*, at 518, 523. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.

Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 11 L. Ed. 2d 179, 84 S. Ct. 219 (1963), that "the purpose of Congress is the ultimate touch-stone" in every pre-emption case. See, e. g., *Cipollone*, 505 U.S. at 516; *Gade*, 505 U.S. at 96; *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 55 L. Ed. 2d 443, 98 S. Ct. 1185 (1978). As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of congressional

> purpose." *Cipollone*, 505 U.S. at 530, n. 27 (opinion of STEVENS, J.). Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. *Gade*, 505 U.S. at 111 (KENNEDY, J., concurring in part and concurring in judgment). Also relevant, however, is the "structure and purpose of the statute as a whole," *id.*, at 98 (opinion of O'CONNOR, J.), as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.[13]

Despite the fact that Judge Batchelder had clearly demonstrated that Judge Posner's decision was the better-reasoned interpretation of *Easterwood*, she did not end her analysis at that point. She carefully harmonized her decision and Judge Posner's decision with the clear, pronounced rules regarding the heavy burden of preemption.

> According to the Supreme Court, preemption analysis must "start with the assumption that the historic police powers of the States [were] not to be superseded by [the] Federal Act unless that [was] the clear and manifest purpose of Congress.". The doctrines of federalism and judicial restraint both counsel courts against lightly casting aside the "basic assumption that Congress did not intend to displace state tort law." Moreover, "the regulation of health and safety matters is, primarily and historically, a matter of local concern." Thus, the presumption against federal preemption of state law is "particularly apt" in the area of railroad safety. Indeed, the Easterwood Court, itself, noted "the

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[13] *Lohr*, 518 U.S. at 485, 116 S. Ct. at 2259

> relatively stringent standard set by the language of [the FRSA's preemption clause] and the presumption against pre-emption . . . "[14]

This is clearly consistent with this Court's charge in *Cipollone, Lohr* and in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). Judge Batchelder also recognized that the presumption against preemption became even stronger where application of the doctrine would deny people with legitimate claims a remedy. *Id.*

If the railroad's common law duty is removed before there is a determination concerning the adequacy of the protection at a given crossing **and** before the proper protective devices were in place, **who will be responsible for safety at the crossing?**

> . . . interpreting Easterwood too broadly (i.e., finding preemption prematurely) will remove responsibility from the railroads before the federal government has stepped in. In that case, no one is responsible for the safety of the motorists who use the crossing; we find in the FRSA no clear intent to achieve such an effect.[15]

* * *

As evidenced by the Amicus Brief filed by the American Association of Railroads ("AAR"), immunity from state tort actions is no small prize. Under the narrow approach announced by the Seventh Circuit, railroads receive that prize only if they have, in fact, taken the desired action. Under the expansive approach, however, railroads get the prize whether or not they have taken the desired action. **It takes nothing more than a rudimentary understanding of economics to see that an incentive-based system**

[14] 173 F.3d at 394, Citations omitted

[15] 173 F.3d at 394

> **does not work unless the reward is somehow tied to performance of the desired action.**[16] (Emphasis supplied)

Judge Posner's language is much stronger than the Sixth Circuit's language, but is nonetheless accurate:

> Indeed, it would have been an **extraordinary act of irresponsibility** for the Secretary of Transportation, by approving the agreement, **to preclude tort liability** for the railroad's failing to have active warnings at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal standards. (Emphasis supplied)[17]

This, also, is consistent with the views of this Court expressed in *Easterwood*.

> In fact, the scheme of negligence **liability** could just as easily **complement** these **regulations** by encouraging **railroads** – the entities arguably most **familiar** with **crossing conditions** – to provide current and complete information to the state agency responsible for determining priorities for improvement projects in accordance with § 924.9.[18]

[16] 173 F.3d at 395

[17] 173 F.3d at 393, 394

[18] 123 L. Ed. at 399, 113 S. Ct. at 1739.

C. The Sixth Circuit Chose NOT to Sacrifice Justice on the Altar of Judicial Economy.

Judge Batchelder was well aware that using "federal funding" as the "bright line test" for preemption simplified a court's job considerably.[19] Fortunately Judge Batchelder does not sacrifice justice at the altar of "judicial economy." Judge Batchelder addressed the issue from every possible angle. She analyzed *Easterwood*, the regulations that triggered preemption, the other cases addressing her issue and strong presumption against federal preemption. Most important, she never lost sight of the most important purpose of tort law, namely, to encourage safe conduct.

IV. THE NEED FOR ADEQUATE PROTECTION AT RAILROAD/HIGHWAY GRADE CROSSINGS.

It is well settled in the common law that railroads must exercise reasonable care to avoid collisions between their trains and automobiles at their grade crossings, yet safety still remains an issue at railroad-highway grade crossings throughout the United States. Over 100 years ago this court addressed essentially these same issues in *Grand Trunk Railway Company v. Ives*, 144 U.S. 408, 12 S. Ct. 679, 36 L. Ed. 485 (1892).

That case involved limited sight distance at a grade crossing. Two people were killed because they were not adequately warned of the approach of the train. *Id.* 144 U.S. at 410. One issue was whether the railroad had a duty to do something more than blow its whistle or sound its bell (there was evidence it did neither). The railroad argued that contentions that it should have done more to warn were barred because "the whole subject of signals, flagmen, gates, etc., at crossings . . . is regulated by statute." *Id.* 144 U.S. at 422. The trial court had

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[19] 173 F.3d at 395

instructed the jury that, under certain circumstances, " . . . reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury . . . : *Id.* at 420. This Court's advice then reflects a common sense approach to grade crossing safety that is applicable today, " . . . the fact that a statute provides certain precautions will not relieve a railroad company from adopting such other measures as safety and common prudence dictate." *Id.* Here, ample proof was presented that grade crossing safety required something more than the minimum.

The potential impact of a finding of preemption in this case on grade crossing safety is chilling. If preemption is granted here, and with the preemptions already granted in speed and other things, the railroads can travel 110 miles per hour over a class six track carrying 100 or more loads of hazardous materials, nuclear war heads and anything else that is dangerous, kill 1,000 or more people per day without a county (or parish), city or state doing anything about it.[20]

Even with the spending of about four billion dollars of public moneys over the past 25 years at grade crossings, the fatalities have not been significantly reduced in the last decade. This is due to several factors. The speed of trains has more than doubled in some locations with almost all locations having a significant increase in train speed. In addition, the volume of train traffic has increased substantially over many crossings. All of this has occurred over some crossings that do not meet even minimum standards for design and traffic control devices in the engineering field. *Id.* paragraphs 2 and 3.

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[20] Affidavit of K. W. Heathington, Ph.D., P.E., paragraph 5. Dr. Heathington's affidavit was filed with the Court.

A. The Hazard of Railroad Grade Crossings.

It requires little sophistication to identify the hazard and the risk at a grade crossing. If a vehicle and a train meet at a grade crossing, the potential for serious injury or death is almost absolute. It is generally accepted that **motorists** in an automobile/train collision are **40 times** more likely to be **seriously injured** or killed than they would be in a collision with another motor vehicle.[21] When we look at the simple physics of an automobile/train collision, the reason is clear.

A train with two engines and 30 cars weighs 3,700 tons. That is a tremendous mass to be pitted against an automobile that weighs between two to three tons. A train striking an automobile is similar to a car running over a soft drink can.[22]

If we compare the momentum of a 3,700 ton train, going only 25 miles per hour, to that of a 40 ton tractor trailer truck, the truck would have to be traveling at a speed of **2,312 miles per hour to achieve the same momentum!** If that same train is traveling 60 miles per hour, our truck would have to increase its speed to **5,550 miles per hour!** *Id.* If we add to the equation the fact that the train traveling 25 miles per hour takes over a quarter of a mile to stop and that the truck traveling 60 miles per hour takes almost **two miles to stop,**[23] it does not take much engineering sophistication to recognize the magnitude of the potential for tragedy.

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[21] "Full Speed Ahead With Railroad Safety," *Safety and Health* January 1991, page 28.

[22] Dr. Heathington Affidavit, paragraph 14.

[23] "Full Speed Ahead With Railroad Safety," page 28.

B. Eliminating or Minimizing the Hazard of Railroads at Grade Crossings.

Clearly, the best way to deal with hazards at a grade crossing is to eliminate the crossing but that is not always practical or feasible.

> Desirably, all railroad crossings should be separated on the rural arterial system. Practical aspects of the problem, however, require that many crossings will be at grade. Crossings can be treated in various ways, including adequate signing, signals, signals with gates, and finally separations. Judgment must be used in the selection process, which will involve the amount and speed of traffic on both the roadway and the railroad and the available sight distance, and safety benefits. The tendency must always be to attempt to **provide** the **best protection possible**.[24] (Emphasis supplied)

Where there must be a crossing of a railroad track and the roadway, there must also be adequate warning devices. In areas where motorists can see for miles in either direction "adequate" protection may simply be cross bucks. Conversely, in any situation where the motorists' view of the oncoming train is limited, flashing lights and/or flashing lights and gates may mean the difference between life or death.

We have known for years that train whistles and headlights are not effective warning devices. *The Visibility and Audibility of Trains Approaching Rail-Highway Grade Crossings* Report FRA-RP-71-1, May 1971. Three primary factors interact to assure that a warning signal is audible to a motorist. These factors are, the sound level of the warning device, the sound treatment of the vehicle shell and the operating noise inside the vehicle. The sound

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[24] AASHTO – *Geometric Design of Highways and Streets*, p. 522

must penetrate the shell of the vehicle at a sound level capable of overriding the existing operating noise inside the vehicle.[25]

Trains can have horns which meet or exceed published standards; however, in the real world, they provide a warning deemed adequate by the Aurelius study when the train is only one to two seconds away from the crossing. *Id.* Motor vehicles are **more** "sound proof" today than they were at the time the above study was conducted, yet the horn on the train has remained essentially unchanged since 1971. *Id.*

No one suggests that trains should operate without lights or that they not sound their horns as they approach grade crossings; however, it is quite clear that they are not to be relied on as warning devices when we know that death or serious injury results if the warning fails.

1. The Use of Gates and Flashing Lights Significantly Reduces the Risk of Serious Injury or Death.

Section 646.214 requires those grade crossings meeting its stated criteria include automatic gates with flashing lights. Studies conducted concerning the effectiveness of flashing lights and gates confirm what simple common sense tells us . . . there is an **80% to 89% reduction** in the rate of **serious injury** and **death** when crossings are upgraded from cross bucks to lights and gates.

Morrissey, J., *The Effectiveness of Flashing Lights and Flashing Lights with Gates in Reducing Accident Frequency at Public Rail-Highway Crossings, 1975-1978*, U.S. Department of Transportation, Transportation System Center, Cambridge, Massachusetts, April, 1980, NTIS PB-81-133886 is a study that analyzes the effectiveness of traffic control

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[25] Affidavit of David M. Lipscomb, Ph.D., paragraph 5, filed with the Court.

devices at 2,994 railroad-highway grade crossings for the years 1975 to 1978. The study was conducted for the Federal Railroad Administration of the U.S. Department of Transportation. That study demonstrated that when upgrading from passive warnings (cross bucks) to gates with flashing light signals, there was an 84% expected reduction in accidents. The results of the D.O.T. study were consistent with the rates found in a similar study conducted earlier in California.[26]

2. The Reduction in the Rate of Serious Injury and Death When Crossings are Upgraded from Flashing Lights Only to Flashing Lights and Gates.

The importance of a physical guard or separation from the tracks can be seen when using the same two studies to assess the impact of the addition of gates to crossings which previously had only flashing lights as the warning device. These studies demonstrated that on the average there is a 61% reduction in accidents when gates with flashing light signals are used instead of flashing light signals only.

C. Cross Bucks are Not an Adequate Warning.

In reality, a cross buck is not a true warning device. There is a significant difference between a warning of a hazardous condition (for example, "high voltage") and a railroad cross buck. All a cross buck tells a motorist is that he or she is about to cross a set of railroad tracks. There is no risk of serious injury or death if no train approaches. Flashing lights, on the other hand, warn of

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[26] *The Effectiveness of Automatic Protection in Reducing Accident Frequency and Severity at Public Grade Crossings in California*, California Public Utilities Commission, Railroad Operations and Safety Branch, Traffic Engineering Section, August, 1975, NTIS PB-254-799.

the imminent approach of a train. The same studies cited above found that an upgrade from passive to flashing light signals will result in an expected 65% effectiveness in the reduction of accidents.

D. Determining the Adequacy of Traffic Control Devices.

There have been clearly-defined procedures for evaluation of the level of protection appropriate for given crossings promulgated by the FHWA for at least 25 years. These procedures were first published in the 1978 *Railroad-Highway Grade Crossing Handbook*. There were office memorandums from FHWA outlining these procedures prior to the publication of the handbook.[27] These same procedures have been given in the publications of the American Association of State Highway and Transportation Official's (AASHTO).[28] These procedures are used to determine whether a crossing should be made active instead of remaining passive and, if it is to be made active, whether flashing light signals or gates with flashing light signals should be used.

> Some of the considerations for evaluating the need for active warning devices at a grade crossing include the type of highway, volume of vehicular traffic, volume of railroad traffic, maximum speed of the railroad trains, permissible speed of vehicular traffic, the volume of pedestrian traffic, accident record, sight distance and the geometrics of the crossing.[29]

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[27] Dr. Heathington's Affidavit, paragraph 21.

[28] *A Policy on Geometric Design of Highways and Streets*, American Association of State Highway and Transportation Officials, 1990.

[29] *Id.*, p. 843.

The similar criteria are found in 23 U.S.C. § 614 for determining whether a crossing has adequate traffic control devices. The crossing characteristics which FHWA proposes to use in determining the need for traffic control devices at a crossing are: (1) Volume of vehicular traffic, (2) Volume of railroad traffic, (3) Maximum speed of railroad trains, (4) Permissible maximum speed of vehicular traffic, (5) Volume of pedestrian traffic, (6) Accident record, (7) Reduced sight distances, and (8) Potential for complete elimination of grade crossing without active traffic control devices provides an engineer with the basis for determining whether a crossing should be made active.

If the engineering decision is to make the crossing active, then the characteristics such as (1) Multiple mainline railroad tracks (2) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing, (3) High speed train operation combined with limited sight distance at either single or multiple track crossings, (4) A combination of high speeds and moderately high volumes of highway and railroad passenger or freight traffic, (5) High speed passenger trains, substantial number of school buses or trucks carrying hazardous materials, or continuing accident occurrences, (6) Recommendations of a multi disciplinary diagnostic inspection team, and (7) Any combination of the conditions listed above, provide the engineer with the information as to whether gates with flashing light signals should be installed.

The installation of passive traffic control devices required in the MUTCD for crossings does not require an engineering analysis. The specifications are already determined for passive devices, and an engineering analysis is needed only for an evaluation of the need to upgrade a crossing. The above procedures when used by the FHWA to determine if something more than passive protection is

required is, in fact, an engineering analysis. This analysis may or may not conclude that flashing lights and gates are needed, but in any event the conclusion is based upon an analysis of site-specific conditions. There was no engineering analysis performed here. There was no determination made by a diagnostic team or anyone else that mere cross bucks were adequate protection for Mr. Shanklin.

V. THE FEDERAL RAILROAD SAFETY ACT'S EXPRESS PREEMPTION CLAUSE EXCLUDES GRADE CROSSING SAFETY.

Where Congress has specifically considered the issue of preemption with an express preemption clause, that clause defines the regulations preemptive effect.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[30]

Common law negligence actions concerning the adequacy of the level of protection at some railroad grade crossings fit within the enumerated exceptions to preemption in the preemption clause of the Federal Railway Safety Act (FRSA). That provision provides:

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[30] *Cipollone*, ___ U.S. at ___, 112 S. Ct. at 2617

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> (1) is necessary to **eliminate or reduce an essentially local safety hazard**;
>
> (2) is **not incompatible** with a law, regulation, or order of the United States Government; and
>
> (3) does **not unreasonably burden** interstate commerce.

49 U.S.C. § 20106.

The basic essence of grade crossing safety is "local". It is not local to the state, county or city in which the crossing is located, but it is "local" to the crossing itself. The level of protection necessary to insure crossing safety is determined by the geometry of the crossing, the speed of the trains and vehicles using the track and roadway, the train and vehicle traffic and the type vehicles using that crossing.[31] These factors differ from crossing to crossing and are subject to change over time. The very manual used by the government and others to access crossing safety, the *Railroad-Highway Grade Crossing Handbook*, specifically states:

> The procedures for evaluating railroad-highway grade crossings are generally based upon the

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[31] *Railroad-Highway Grade Crossing Handbook*, U.S. Department of Transportation, Federal Highway Administration, 1986

> physical and operational characteristics of **individual** crossings.[32] (Emphasis supplied.)

A critical factor in collisions at passive crossings is limited sight distances. It was **the** factor for Mr. Shanklin.

> Sight distance is an important consideration at railroad grade crossings. There must be sufficient sight distance on the road for the driver to recognize the crossing, perceive the warning device as well as the train, and stop if necessary.[33]

In many instances neither the motorist nor the engineer can see the other before it is too late. The "visibility triangle" is critical and is part of the routine analysis of each individual crossing. The problem is unique to each crossing.

As this Court noted in *Easterwood*, the railroad is the one entity that is in the best position to be aware that a dangerous condition exists at a crossing. Its trains pass through each crossing on a daily basis. Its maintenance crews pass through on a weekly or monthly basis. Important aspects of crossing safety can and do change. The railroad is the entity most likely to become aware of that change. This, again, is specifically addressed in the *Railroad-Highway Grade Crossing Handbook*:

> The approach sight triangle is the second area that should be kept free from obstructions. This area provides approaching motorists with a view of an approaching train. It can encompass a rather large area that is usually privately owned. In rural areas this sight triangle may contain crops or other farm equipment that

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[32] *Id.* at p. 85

[33] AASHTO – *Geometric Design of Highways and Streets*, p. 432

> block the motorists' view. For this reason clearing the sight triangle can be difficult to achieve.[34]

For these reasons, the safety of a particular crossing can change from day to day, month to month or year to year. Regulatory activity is not well suited to deal with these issues; however, common law negligence is. Mrs. Shanklin's case takes a snapshot in time; analyzing the factors as they existed at the time of the event. It systematically determines the parties' duties to each other, their actions, the conditions under which the event occurred and what each party could have reasonably done, exercising reasonable care, to prevent the tragedy from occurring. The system is not perfect, but neither is a regulatory scheme that allows months and years to go by before addressing a known hazard. Both are important where issues of public safety are concerned.

Any safety regulation that is incompatible with a party's duty to exercise reasonable care must be circumspect. Safety must come first. Common sense dictates that no regulation should be in conflict with actions necessary to reduce or eliminate the risk of serious injury or death. In common law negligence claims, the parties look to the same publications to assess grade crossing safety that the diagnostic team would use. The issue in this case was sight distance; Mr. Shanklin's ability to see the train. Plaintiff's exhibit 23 is the sight distance triangle from the *Railroad-Highway Grade Crossing Handbook*.

Common law negligence existed harmoniously with the regulation of the railroad by states and the federal government before the passage of the FRSA. There is nothing in a plan that provides a rational method of allocating tax dollars that is at cross purposes with common law requirements to exercise reasonable care. The potential of a common law negligence claim is intended

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[34] *Id.* at pp. 134, 135

to encourage safe conduct. Just as this Court recognized over 100 years ago, there is no good reason to excuse a "railroad company from adopting such other measures as safety and common prudence dictate." *Ives, supra.* Here, that failure cost a man his life.

CONCLUSION

It would indeed be a bitter irony if a regulation enacted to enhance safety and improve the level of protection at railroad grade crossings would become the source of the total abrogation of the railroads' responsibility for safety at those crossings. If we accept the railroad's argument, we turn our back on reality and risk life and limb, while we await a taxpayer's solution to a problem that has been the railroads' responsibility for over a century.

Respectfully submitted,

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No. 99-312

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IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS
NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF FOR THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether federal statutes and regulations relating to the uniformity and financing of grade crossing signals, promulgated pursuant to the Federal Highway Safety Act and Federal-Aid Highway Act, preempt state common-law requirement that railroads maintain safe grade crossings?

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NORFOLK SOUTHERN RAILWAY COMPANY,
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DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The amicus, United Transportation Union, represents the craft of employees in the railroad industry known as engineers, conductors, trainmen, brakemen, yardmasters, hostlers and hostler helpers.* It is the largest railroad

* Pursuant to Rule 37.6, Amicus United Transportation Union certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Amicus and its counsel made any monetary contribution to the preparation or submission of this brief.

Both parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court.

union in the United States. Its members are on board each train that is involved in a rail-highway grade crossing accident, many of whom suffer casualties in such accidents. The sole interest of UTU here is to help assure that the nation's crossings become safe for both the public and railroad employees.

SUMMARY OF ARGUMENT

1. Based upon current funding levels, it will take 100 years to safely equip highway-railroad grade crossings. Federal funding for crossings began in 1916 and currently only 20.4% of the 261,266 public and private crossings have both gates and lights.

2. The legislative history and the FRSA statute itself confirm that Congress intended to preserve *any state law* (which includes state common law) until the Secretary promulgates a specific rule regulation, or order covering the subject matter. The congressional hearings and committee reports buttress the point that states retain the right to continue in force *any* law until the Secretary issues a standard covering the subject matter. When coupling this with the court's consistent preservation of traditional areas of state police powers, the state common law should be preserved in this case.

3. Because of the *local safety hazard* savings clause in the FRSA, the preemption provisions do not foreclose tort liability even where crossings are improved. Even assuming *arguendo* that the FHWA regulations cover the subject matter of the general adequacy of crossing warning requirements, the savings clause in the FRSA allows recovery here. A state may impose more stringent requirements where there exists a *local* safety hazard. Nothing is more local in railroad safety than a particular crossing which is unsafe. The Court noted this possible

exception to preemption in *Easterwood*, 507 U.S. at 675 n.5.

Congress was aware of the tragedies occurring at crossings when it adopted the FRSA, and nowhere did it suggest that the public should be foreclosed from seeking recovery in a crossing accident.

4. If Congress had intended to preempt state common law, it would have so stated as it did in other legislation. (see, e.g. 12 U.S.C. § 1715z-17(d), -18(e) and 17 U.S.C. § 301(a).

5. The Federal Railroad Administration, the agency which promulgated the track regulations upon which the Court relied in *Easterwood*, disagrees with the Court regarding train speed. The FRA does not agree that the track regulations *substantially subsume* the subject matter of train speed. See 62 Fed. Reg. 36138, 36143-44 (July 3, 1997). It stated in the NPRM that *FRA has only an indirect role in determining speed limits.* It also said that . . . *FRA has never assumed the task of setting train speed.* Therefore, the Court should take this opportunity to reconsider its conclusions regarding train speed as it relates to preemption.

6. The Federal Highway Administration has long recognized that the federal grade crossing safety standards are minimum. As far back as 1945, FHWA's predecessor agency recognized that the standards were necessarily minimum. (See General Administrative Memorandum 288 (Oct. 9, 1945). See, also, U.S. Bureau of Public Roads Policy and Procedures Memorandum No. 40-2 (Oct. 12, 1954). Throughout a memorandum dated October 8, 1976 to all regional federal highway administrators, the directors of the Office of Highway Safety and the Office of Engineering, it was emphasized that the federal standards were minimum.

7. The railroad industry has sought relief from the consequences of *Easterwood* both in Congress and the Department of Transportation, and was unsuccessful. See *Hearings on Railroad Safety Before the Subcommittee on Transportation and Hazardous Materials of The House Committee on Energy and Commerce*, 103rd Cong. 79-80 (November 1993 and June 15, 1994); *Hearing on Oversight and Re-authorization of Rail Safety Programs and S. 2132, the Federal Railroad Safety Authorization Act, Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 46 (June 14, 1994).

Also, Senator John Danforth on May 18, 1994 introduced S. 2127 which would have provided the relief sought by the railroads. Congress did not adopt the provisions. Having failed in Congress, the railroads attempted to gain relief through the FRA. (See FRA Docket No. RSGC-6). In the NPRM, the FRA proposed to prohibit railroads from selecting and installing warning systems at crossings. This would have eliminated any duty upon the railroads for crossing improvements, and freed them to argue in tort litigation that, since their duty was eliminated, there could be no liability. Hearings were conducted on June 5, 1995, and on August 8, 1997 the FRA terminated the proceeding. See 62 Fed. Reg. 42733.

8. Presidential Executive Order 13132 was issued on August 4, 1999 (64 Fed. Reg. 43255). In it Federal agencies are barred from concluding that they have the power to issue preemptive regulations unless there is clear evidence that Congress intended such a result.

ARGUMENT

I. Statistics Belie the Railroad's Arguments—At Current Spending Levels, It Wiill Take 100 Years to Fully Equip Crossings.

A. To date the railroads have concentrated their safety efforts on seeking government funds, both state and federal, allocated for crossing safety. The largest funding source is federal government appropriations. But such funding is minimal in relation to the needs to make crossings safe for the public. The closure of crossings is a high priority, but the practical political problems encountered at local levels to retain crossings because of convenience to motor vehicle travelers usually prevails. The fallacy in the railroad's position is that the government has *substantially subsumed* the subject matter of highway-rail grade crossing safety by appropriating funds to be used to improve the safety at such crossings. The funds allotted by Congress over the years has only touched the surface of protecting the public from train accidents. The obvious limitations of funding to eliminate crossing hazards has been recognized for many years. In the Hearing on the FY 71 supplemental appropriations, the FRA Administrator's testimony states:

> If every grade crossing could be protected with an active device, the problems experienced could be reduced to minimum levels. In view of generally limited monetary resources, however, it is, and will continue for many years to be. necessary to protect many grade crossings with devices that only inform the motorist of hazard and place upon him the responsibility for a decision of whether or not it is safe to proceed. As a result, it is believed that the greatest and immediate opportunity for the improvement of the motorists' decision-making process is in the area of passive protection of grade crossings. There will

always be a need for a family of passive devices which can be tailored to meet the range of situations which it may not be economically feasible to treat with active devices.

Hearings on FY71 Supplemental Appropriations Before the House Committee on Appropriations, 91st Cong., 2d Sess. 665 (1971). At the current rate of Congressional funding, it will take approximately 100 years to fully equip crossings with adequate safety features.

Deaths at highway-rail crossings rank # 1 among rail-related deaths. *Annually, fatalities caused by collision between automobiles, trucks and trains, and fatalities from people being illegally on railroad property and tracks usually account for more than 90% of all railroad-related deaths. Hearings on Re-authorization of the Federal Railroad Administration: Before the Subcommittee on Railroads of the House Committee on Transportation and Infrastructure,* 105th Cong., 2d Sess. 62 (March 26, 1998). For example between 1994-1998 a total of 2,574 persons died in collisions at crossings and 8,308 were injured. There are approximately 4,000 collisions annually. FRA Docket No. 1999-6439, Notice No. 1, 65 Fed. Reg. 2230 (Jan. 2000).

In 1998 nationwide, there were 261,266 highway-rail crossings, 158,590 of which were located at public crossings. Based on the latest published data available, 47.6% (75,558) of all public crossings were equipped only with crossbucks. 17.7% (20,098) had flashing lights, and 20.4% (32,406) had both gates and lights.[1] The cost to improve a crossing with flashing lights and gates is approximately $150,000; improved four-quadrant gates cost

[1] *Railroad Safety Statistics, Annual Report 1998,* Tables 8-2 and 8-5, Federal Railroad Administration (July 1999).

nearly $1 million; and a standard grade separation is $3 million.[2]

Approximately every 90 minutes someone is struck either as a consequence of a motor vehicle-train collision or pedestrian-train collision. Last year there were 3,375 collisions involving motor vehicles and trains. Incidents at public crossings equipped with only crossbucks accounted for almost 37.7% of the total, twice the number as compared with crossings equipped with lights or either gates and lights.[3]

Trains cannot stop in a short distance. A freight train with 100 loaded cars traveling 50 mph needs approximately 1⅓ miles to stop. See FRA Docket No. 1999-6439. *supra,* 65 Fed. Reg. 2230. An eight car passenger train going at a speed of 79 mph needs 1⅛ miles to stop.

Experience demonstrates that drivers of motor vehicles approaching a crossing react differently to the various active and passive warning signs and signals, depending upon their individual experiences. Obviously, where just crossbucks exist, drivers are much less likely to *stop, look, and listen* as when approaching an active signaled crossing. Research has shown that most motorists approaching grade crossings having passive warning systems do not expect to encounter a train, and approximately 70% of the motorists do not look for trains. *See Proceedings, 1995 National Conference on Highway-Rail Safety,* p. 36 (July 16-18) (Publisher: TRANSCOM, College Station, Tex.).

[2] National Transportation Safety Board, *Safety Study: Safety at Passive Grade Crossings, Volume 1: Analysis,* NTSB/SS-98/02 at pp. vii and 5 (1998); United States General Accounting Office, *Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety,* GAO/RCED-95-191 at p. 33 (1995).

[3] *1998 Railroad Safety Statistics, supra,* Table 9-4.

It doesn't take a magic wand to correct the horrendous safety problem at crossings—it only takes funding. Either construct highway grade separation overpass or underpass; build gates at the crossings that are impenetrable; or close the crossings. At present the railroads take the untenable position that they should not be legally responsible for crossing accidents because of federal preemption. But Congress has intervened to provide minimum funding and mandating various studies, and education endeavors. While the crossing improvements must be uniform, that shouldn't absolve a railroad from using reasonable care to keep all crossings safe.

B. Since 1916, Congress has made Federal funds available for grade crossing safety improvement. The Federal-Aid Road Act of 1916 (Pub. L. 64-155, 39 Stat. 355) provided funds for *rural post roads*. The grade crossing safety improvement projects were eligible for funding based on a 50-50 sharing basis. In 1933, Congress enacted the National Industrial Recovery Act (Pub. L. 73-67, 48 Stat. 200). Federal funds were authorized for crossing safety, but the previously enacted 50-50 matching cost provision was eliminated. In 1970, Congress adopted the Federal Railroad Safety and Hazardous Materials Transportation Control Act (Pub. L. 91-458) and the Federal-Aid Highway Act (Pub. L. 91-605), both containing provisions that the Secretary shall study and issue a report on rail-highway crossing problems. Based upon some of the recommendations submitted by the Secretary, Congress in the Federal-Aid Highway Act of 1973 (Pub. L. 93-87) appropriated $175 million over three years for highway rail crossing safety improvements on the federal-aid highway system. The money was required to be distributed on a basis of State matching funds of 10%. At least half of the funds were required to be used for installation of warning devices at crossings.

A survey of all crossings was also required in the legislation. The Federal-Aid Highway Act of 1976 (Pub. L. 94-280), provided $250 million over a period of 27 months for the crossings on the Federal highway system, and an additional $168.75 million for crossings not on the Federal-aid system. In 1978 (Pub. L. 95-599) and 1982, Congress provided $198 million per year for four years in each Act. The distinction between crossings on and off the Federal-aid system was deleted, and the funding was based upon a 50% sharing basis related to the number of crossings in each State. In 1987, the Surface Transportation and Uniform Relocation Assistance Act (Pub. L. 100-17) provided $160 million per year for 5 years. In that Act, the Secretary was required to conduct a study of the crossing improvement and maintenance needs. The report was submitted in 1989, entitled *Rail-Highway Crossings Study*. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (Pub. L. 102-240), continued the $160 million funding authorized in the 1987 law. Also there were provisions in the Act for additional funding, and one was added to allow 100% financing of certain improvements. Congress authorized 10% of the total funding of surface transportation to be set aside for various safety programs, including crossing safety. In § 1007 of ISTEA, states were required to spend $149 million on highway-rail crossing improvements, and at least 50% of these funds to be spent on the installation or upgrading of warning devices. The remainder of the funds were to be spent on additional warning devices or on other ways of eliminating crossing highway-rail crossing hazards. Congress established a formula in which States would receive funds based upon the number of crossings, highway route, miles, geographical area and population. Crossing accidents and casualties are not part of the formula. Additionally, the

States received over $116 million which could be spent on hazard elimination at crossings or on highways. All of the public highway-rail crossings were eligible. Section 1010 of ISTEA authorized $30 million over 6 years for the elimination of hazards of both public and private highway crossings in up to 5 high speed corridors identified by Congress. In § 3036 there were funds for a technology demonstration program to facilitate high-speed rail service. Most of the projects address highway-rail crossings. Section 1072 requires the Department of Transportation to coordinate field testing of a vehicle proximity alert system for use on emergency, police, school busses and hazardous materials vehicles. Section 1077 required the revision of the Manual on Uniform Traffic Control Devices to grant States and local governments the authority to install STOP or YIELD signs at any highway-rail grade crossing without automatic control devices with two or more trains operating the crossing per day.

Over the six/year life of ISTEA through 1997, the FHWA has provided almost $900 million in contract authority for the rail/highway crossing program. The Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107, June 9, 1998 provides crossing funds and, additionally, expands the eligibility program to include trespasser countermeasures, railway/highway crossing education, enforcement of traffic laws, and projects at private crossings where there is an identified public benefit. *See Hearings on Re-authorization of the Federal Railroad Administration, supra* a 62-64 (March 26, 1998).

II. The Legislative History, and the Language of the FRSA Confirm That Congress Intended to Preserve *Any State Law* Until the Secretary Promulgates a Specific Rule, Regulation, or Order Covering the Subject Matter.

A. The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary of Transportation. *See Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Committee*, 90th Cong., 2d Sess. 1-6, Serial No. 90-39 (1968). Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas. No further action was taken by Congress in the 90th Congress.

On April 18, 1969, the Secretary of Transportation created a Task Force on railroad safety comprised of representatives from the Federal Railroad Administration, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force was submitted to the Secretary on June 30, 1969. On the preemption issue the Report provided that *Existing State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation.* Subsequent to the Report the interested parties together attempted to draft a proposed bill for Congressional consideration in the 91st Congress. Regarding preemption, the bill drafted by the Federal Railroad Administration was not acceptable to either labor or the state commissions. Even in the section-by-section analysis of the Administration's bill by the Secretary, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted . . . *unless the Secretary prescribed federal safety standards covering the subject matter of the particular state or local safety requirements.* . . .

The preemptive language of S. 3061 and H.R. 14417 as introduced provided:

> Sec. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the State or local laws, regulations or standards.

Section 5 above was revised and incorporated into the compromise legislation reported by both Senate and House Committees, and ultimately passed by Congress in S. 1933. In testifying on the proposed bill, then Secretary of Transportation Volpe discussed S. 1933 as passed by the Senate and pointed out the areas of permissible state jurisdiction over railroad safety. The relevant portion of the testimony states:

> To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute. . . .

Hearings on H.R. 7068, H.R. 11417, and H.R. 11478 (and similar bills), S. 1933 Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 29 (1970).[4]

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 20106 was a countervailing concern to its desire for national uniformity. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970). As stated in Senate Report:

> The committee recognizes the State concern for railroad safety in some areas. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. ***All State requirements will remain in effect*** until preempted by federal action concerning the same subject matter. (Emphasis added).

S. Rep. No. 619, 91st Cong., 1st Sess. 8-9 (1969).

> Testimony presented before the committee, as well as experience with other safety laws which have national application, seem to lead to the conclusion that the States should have a role in the total safety effort. In particular, the States should be able to impose regulations relating to local hazards so long as the regulations do not unnecessarily burden interstate commerce and are not inconsistent with federal regulations.

Id. at 5.

As Congress has explicitly stated, the FRSA as adopted *prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void*

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[4] Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, were incorporated into 45 U.S.C. § 434.

the specific rules and regulations of the state. Id. at 12. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, as in the case of the Federal-Aid Highway Act, are intended to preempt state railroad safety regulations, much less to preempt state common law protection. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. 45 U.S.C. § 434; *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

In view of the Court's consistent preservation of traditional areas of state police powers, the common law should be upheld in this case. The Court has made clear that preemption will not lie in areas traditionally regulated under States historic police power *unless that was the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). *CSX Transportation Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *English v. General Electric Co.*, 496 U.S. 72, 78, 89 (1990). Since *Easterwood*, the Court has consistently rejected preemption defense where, otherwise, it would immunize defendants from state law tort claims. See *Medtronics, Inc. v. Lohr*, 518 U.S. 470 (1996) (re medical devices); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (airline rates); *Freightliner Corporation, et al. v. Ben Myrick*, 514 U.S. 280 (1995) (negligent design of tractor-trailer). State tort law is clearly within the States' historic police power. See, e.g., *Farmer v.*

United Brotherhood of Carpenters, 430 U.S. 290, 304 (1977), and states traditionally have imposed upon railroads a common law duty to exercise reasonable care at grade crossings.

B. There is another equally valid reason not to preempt state common law here. The applicable preemption statute is explicit that a state may continue in force *a law* until the Secretary prescribes a regulation or issues an order covering the subject matter. 49 U.S.C. § 20106. As originally enacted, the relevant words read *any law*. (45 U.S.C. § 434). The 1994 codification of the transportation laws did not intend to change the substance of the laws being amended. Pub. L. 103-272, § 1(a), July 5, 1994. The Court has construed *law* in various contexts broadly, which would include common law See, e.g., *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938); *Commisioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 464 (1967); *West, et al. v. AT&T Co.*, 311 U.S. 223 (1940); *United States Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34, 37 (1930); See, also, *Howell, et al. v. Witman-Schwartz Corp.*, 7 F.2d 513, 514 (3d Cir. 1925); *Estate of Daniel I. Perlberg v. Ellis I. Perlberg*, 694 S.W. 2d 304, 308 (Tenn. App. 1984); *Daver v. Zabel*, 156 N.W. 2d 34, 37 (Mich. 1967). Therefore, since *common law* is included in the word *law*, then the state common law is not preempted unless substantially subsumed by a federal regulation or order. No federal regulation or order exists relating to crossings which even refers to state common law.

III. Because of the *Local Safety Hazard* Savings Clause, The Preemption Provisions of the FRSA Do Not Foreclose Tort Liability Even Where Crossings Are Improved.

First, nowhere in the congressional hearings, House/Senate reports, nor debate on the floor of Congress is there any suggestion that the public should be foreclosed from seeking recovery in a crossing accident. Congress certainly was aware of the tragedies occurring at crossings. See S. Rep. 91-619, *supra* at 4. *The committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations.* H.R. Rep. 91-1194, *supra* at 8.

Even assuming *arguendo* that the FHWA regulations cover the subject matter of the general adequacy crossing warning requirements, the savings clause in the FRSA allows recovery here. A state may impose more stringent requirements pursuant to 49 U.S.C. § 20106 where there exists a *local* safety hazard. The Court noted this possible exception to preemption in *Easterwood*, 507 U.S. at 675 n. 15, but did not elaborate. If the railroad relies on FRSA preemption, then *all* of the statutory section must be applied. This necessarily includes the savings clause regarding local safety hazards. Nothing is more *local* in railroad safety than a particular crossing which is unsafe.

The common law of each state requires that railroads exercise reasonable care in warning of the approach of their trains. Haralson & Levine, *Grade Crossings and Train Speed: Preemption*, Trial, Feb. 1991, at 26. Even under the most stringent application of the FRSA's express preemption clause, the states can regulate because grade crossings pose unique local hazards. *The sheer number of possible factors renders nationally uniform safety standards for grade crossings impractical. Id.* at 21.

The historical police powers of the states have always been jealously guarded against unwarranted intrusion by federal law particularly where, as here, the federal regulation provides no private right of action. Unlike common law, the FRSA provides no private right of action for individuals injured as a result of railroad negligence. Further, there is nothing in the FRSA to suggest that the regulations promulgated thereby established anything other than minimum standards.

In *CSX Transporation, Inc. v. Easterwood*, 507 U.S. 658 (1993) the Court interpreted the preemption provisions of the FRSA, as it applies to grade crossing litigation. It concluded that federal regulations must *substantially subsume* the subject matter of state law before preemption occurs. *Id.* at 664. The Court concluded that (1) 23 C.F.R. Part 924, which establishes priorities for addressing highway hazards and guides the implementation and evaluation of remedial measures, does not of itself establish preemption. *Id.* at 667-668; (2) the MUTCD does not cover the subject matter of tort law of grade crossings. *Id.* at 668; (3) If 23 C.F.R. §§ 646, 214(b)(3) and (4) are applicable, which require that a project for improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds participate in the installation of warning devices, state tort law is preempted. *Id.* at 670; and (4) implied preemption is not applicable in view of the above analysis. *Id.* at 673 n. 12.

The Court left open the situation whether a specific, individual hazard would bar a suit for common law tort. *Id.* at 675, n. 15. The railroad in that case was prepared to concede that preemption would not bar a suit for related tort law duties. *Id.* In applying the FRSA local safety hazard exclusion from preemption, the present case brings that issue to the Court for decision.

The current trend by railroads to seek total preemption, not only of state statutory and regulatory law, but of state common law as well, is among the most invasive and egregious of violations to the sovereignty of the states and their efforts to protect their citizens.

As with the Petitioner in *Medtronics, Inc.*, the railroad is really seeking complete immunity from any tort obligation. Similarly, as stated in the concurring opinion, *it is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

As discussed in *Medtronics*, Congress in the laws applicable in this case was primarily concerned with the issue of conflicting statutes and regulations, rather than the general duties enforced by comon law actions. 518 U.S. at 489.

IV. If Congress Had Intended To Preempt State Common Law, It Would Have So Stated As It Did In Other Legislation.

Under the FRSA, Congress limited the preemption of state law by allowing a state to *adopt* a *law, regulation, or order* relating to railroad safety until DOT prescribes a rule or issues on order. Common law tort liability was not mentioned by Congress. Had Congress intended to bar recovery for tort liability, it would have so stated, as it has done in other legislation. See, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z, -17(d), -18(e) (Supp. V 1987) (preempt any *state constitution, statute, court decree, common law, rule, or public policy*); Copyright Act of 1976, 17 U.S.C. § 301(a) (preempt *under the common law or statutes of any state*). (Emphasis added). We have not found any federal legislation which has specifically pre-

empted state common law, nor any congressional reports, or statements by members of Congress to do so.

We recognize Congress, at times, has enacted legislation which specifically allows one to seek common law claims. See, e.g. 33 U.S.C. § 1365(e) regarding water pollution prevention and control. (. . . *Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation to seek any other relief* . . .). Similarly, see 33 U.S.C. § 1415 (g)(5) regarding navigable waters.

In the present case, Congress has done neither. Therefore, it follows that the implied preemption analysis is to be applied by the Court.

V. FRA, The Federal Agency Which Promulgated the Track Regulations Upon Which the Court Relied in *Easterwood*, Disagrees With the Court Regarding Train Speed.

FRA, the agency which promulgated the track standards upon which the Court relied in *Easterwood* does not agree that those regulations *substantially subsume* the subject matter of train speed. As stated by FRA in its NPRM on July 3, 1997 regarding proposed revisions to its track standards:

> *FRA has only an indirect role in determining speed limits.* Railroads set train speed in their timetables or train orders. Once a railroad sets a train speed, it must then maintain the track according to FRA standards. . . . (Emphasis added).

62 Fed. Reg. 36138, 36144.

> Notwithstanding some of the language in Easterwood that a cursory reading may otherwise indicate, *FRA has never assumed the task of setting train speed.* Rather the agency holds railroads responsible

for minimizing the risk of derailment by properly maintaining track for the speed they set themselves. (Emphasis added).

62 Fed. Reg. at 36143-44.

Since the Court gives great weight to an agency's interpretation of its own regulations, the Court could take this opportunity to reconsider its conclusions regarding train speed and preemption.

VI. The Railroad Industry Has Sought Relief From the Consequences of *Easterwood*, Both in Congress and Department of Transportation, and Was Unsuccessful.

A. In 1994, the railroad industry attempted to obtain Federal legislation which would have provided relief to the railroads from the consequences of the Supreme Court decision in *Easterwood*. See *Hearings on Railroad Safety Before the Subcommittee on Transportation and Hazardous Materials of The House Committee On Energy and Commerce*, 103d Cong., 79-80 (November 1993 and June 15, 1994); *Hearing on Oversight and Re-authorization of Rail Safety Programs and S. 2132, the Federal Railroad Safety Authorization Act, Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 46 (June 14, 1994). At the hearing the railroads testimony stated:

> Railroad responsibilities related to grade crossings should be limited to providing states with needed train traffic and certain other crossing information, crossing safety warning device operation (if installation and maintenance is performed by railroad personnel), train operations, and crossing sight distance on railroad right-of-way.

Id at 46.

Also, Senator John Danforth on May 18, 1994 introduced S.2127 which would have provided the relief sought

by the railroads. Senator Danforth's bill provided railroads the following relief:

> GRADE CROSSING SIGNAL DEVICES.—The Secretary shall, within one year after the date of enactment of this subsection, establish nationally uniform standards regarding the allocation of responsibility for selection and installation of signal devices at public railroad-highway grade crossings.

Congress did not adopt such provisions.

B. Having failed in Congress, the railroads sought relief from the Federal Railroad Administration. (See FRA Docket No. RSGC-6). In the NPRM, FRA proposed to prohibit railroads from selecting and installing grade crossing warning systems at public highway-rail crossings. This would have eliminated any duty upon the railroads for crossing improvements, and freed them to argue in tort litigation that since there was no duty, there could be no liability. Hearings were conducted on June 5, 1995, and the railroads voiced their concern of being responsible for grade crossing improvements. On August 8, 1997 the FRA terminated the proceeding stating:

> Termination of this rulemaking is based on public comments and FRA's determination that railroad safety will not be best served by issuances of such regulation at this time.

62 Fed. Reg. 42733.

VII. The Federal Highway Adminstration Has Long Recognized That the Federal Grade Crossing Safety Standards Are Minimum.

At the outset, the *amicus* agrees completely with respondent Shanklin that Congress established only minimum protection requirements for crossings. Through the years this has been recognized by the Federal government.

Since the first Federal-Aid Road Act was adopted in 1916 and until 1958, there were at least 40 separate laws on the subject, excluding appropriation acts. S. Rep. No. 1928, 85th Cong., 2d Sess. 1 (1958). In the subsequent years there have been many other relevant enactments. With regard to the need for improved safety at crossings, Congress has consistently equated safety standards to minimum requirements and this policy has been applied by the federal government. The Federal-Aid Highway Act of 1936 authorized expenditure for highway railroad grade crossings as determined by the U.S. Bureau of Public Roads *as being adequate.* Pub. L. 74-686, 49 Stat. 1519, 1521 (1936). This language became the basis for 23 U.S.C. § 109(e). Pursuant to the various Federal-aid highway acts, the U.S. Bureau of Public Roads issued General Administrative Memorandum 288 (October 9, 1945). The Commissioners there noted that some of the standards accepted for interstate system improvements adopted at that time were *necessarily minimum value.* (Emphasis added). In the U.S. Bureau of Public Roads Policy and Procedure Memorandum No. 40-2 (October 12, 1954), which memorandum superseded the previously mentioned GAM 288, the MUTCD was accepted for application to signing and marking of federal aid projects. The said PPM states that *Designs substantially in accord with the standard enumerated herein will be acceptable to Public Roads. When standard provide both minimum and desirable values, the use of the higher value is encouraged.* (Para. 5). (Emphasis added.)

In a memorandum dated October 8, 1976, to all regional federal highway administrators, the directors of the Office of Highway Safety and the Office of Engineering pointed out that § 203(a) provided that each State should *establish and implement a schedule of grade crossing improvement and as a minimum, the schedule shall provide signs*

for all railroad-highway grade crossings. Appendix attached hereto. (Emphasis added). It further stated that the Federal Highway Administration is urged to make commitments to the State *to provide this minimum level of protection at all public crossings in the State within a reasonable period of time. . . .* (*Id.*) (Emphasis added). The memorandum went on to note that *Implementation of this program calls for, as a minimum, meeting the MUTCD standards for signing and marking at all public grade crossings both on and off the Fed-Aid System.* (*Id.*) (Emphasis added). It also notes *To this end, Federal funds are eligible to participate in the cost of labor and materials to meet this minimum requirement either under § 203 of the 1973 and 1976 Acts, 23 U.S.C. § 405, 23 U.S.C. § 219, or 23 U.S.C. § 402. . . .* (*Id.*) (Emphasis added). It is obvious from this memorandum that the federal program set the *minimum* standards to be applied for improvements at grade crossings.

The 1954 Policy and Procedure Memorandum was supeseded by the Federal-Aid Highway Program Manual. The FAHPM Transmittal 298 (March 5, 1979) at p. 6 states: *Section 203(a) of the Highway Safety Act of 1973 requires as a minimum that each State's schedule of improvements shall provide signs at all crossings.* (Emphasis added.)

VIII. The Recently Issued Presidential Executive Order 13132 Sets Out The Policy Of The Federal Government Not To Preempt State Laws.

On August 4, 1999, the President issued Executive Order 13132 (64 Fed. Reg. 43255 (Aug. 10, 1999)). It requires, among other things, that federal agencies *in determining whether to establish uniform national standards, consult with appropriate state and local officials as to the need for national standards. . . .* In addition, *where possible, defer to the States to establish standards;*

64 Fed. Reg. at 43256. Agencies are required to *closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States. . . .* Fed. Reg. at 43255.

Regarding preemption of State laws, Federal agencies are barred from concluding that they have the power to issue preemptive regulations unless there is clear evidence that Congress intended such a result. The complete text of the preemption discussion states:

> Sec. 4. Special Requirements for Preemption. Agencies, in taking action that preempts State law, shall act in strict accordance with governing law.
>
> (a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.
>
> (b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.
>
> (c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.
>
> (d) When an agency foresees the possibility of a conflict between State law and Federally protected

> interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.
>
> (e) When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

64 Fed. Reg. at 43256-7

CONCLUSION

For the reasons set forth herein, the decision of the court below should be affirmed.

Respectfully submitted,

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January 28, 2000

APPENDIX

APPENDIX

UNITED STATES GOVERNMENT
Memorandum

Department of Transportation
Federal Highway Administration
Washington, D.C. 20590

Date: Oct. 8, 1976

In reply HHS-10
refer to: HNG-14

Subject: Producing a Schedule in Each State for Signing and Marking All Public Railroad-Highway Grade Crossings

From: Directors, Offices of Engineering and Highway Safety

To: Regional Federal Highway Administrators Regions 1-10

As the subject matter is designated by the FHWA as a Program Emphasis Area for fiscal year 1977, this memorandum groups together the following pertinent information on this topic for your convenient reference and use:

- When the Highway Safety Act of 1973 was under consideration by the Congress, the House Public Works Committee expressed the hope that by the end of fiscal year 1976, every public railroad-highway grade crossing in America would be equipped with adequate advance warning signs and crossbucks (see page 35 of the Report of the Committee on Public Works—Federal-Aid Highway Act of 1973—House Report number 93-118).
- Section 203(a) of the Highway Safety Act of 1973 provides that each State shall establish and im-

plement a schedule of grade crossing safety improvements. As a minimum, the schedule shall provide signs for all railroad-highway grade crossings.

- Paragraph 6b (1) of the FHPM (6-8-2-1) further provides that as a first priority, each State, in cooperation with the involved railroad and any other agency having jurisdiction (e.g., State public service commissions), shall identify those grade crossings at which there are either no signs or nonstandard signs (e.g., not reflectorized, wrong message and/or color, improper placement, etc.) and institute an improvement program to provide signing and pavement marking in compliance with the MUTCD at all grade crossings.
- Paragraph 6c(1) (a) of the FHPM (6-8-2-1) provides that first priority shall be given to those grade crossings at which there are no warning signs or nonstandard signs.
- Mr. H. L. Anderson's memorandum of March 18, 1976, to Regional Federal Highway Administrators, Regions 1, 3 through 10, also provides that for those States that have obligated all of the safety funds available under 23 U.S.C. 405 (Safer Roads Demonstration Program), the purchase and installation of advance warning signs and reflectorized crossbucks at crossings off the Federal-aid system are eligible for 402 funds. This memorandum describes this activity as an excellent program for the States and requests Division Administrators to encourage their States to expedite this program. It also suggests that commitments be made by the States to provide this minimum level of protection at all public crossings in the State

within a reasonable period of time acceptable to the Division Administrator.

- A computer program, for use in connection with DOT/AAR national inventory data on grade crossings has been developed by the Office of Highway Planning's Program Management Division for checking grade crossing warning devices for compliance with MUTCD requirements and is available as described in Mr. C. W. Friesen's September 22, 1975, memorandum to Regional Federal Highway Administrators. Mr. H. L. Anderson's September 13, 1976, memorandum to all Regional Federal Highway Administrators distributed for use by our field offices a computer listing from this program of all crossings which may be deficient with respect to the minimum signing and marking requirements prescribed by the MUTCD.

All of the foregoing program information has been made available over the past several years to regions, divisions, and States but was contained in separate correspondence and documents. Implementation of this program calls for, as a minimum, meeting the MUTCD standards for signing and marking at all public grade crossings both on and off the Federal-aid system. These standards include, for each approach, the placement of reflectorized crossbucks and, with minor exceptions identified in the MUTCD, advance warning signs and pavement markings at all public railroad-highway grade crossings. To this end, Federal funds are eligible to participate in the cost of labor and materials to meet this minimum requirement either under Section 203 of the 1973 and 1976 Acts, 23 U.S.C. 405, 23 U.S.C. 219, or 23 U.S.C. 402 as indicated above.

The Offices of Engineering and Highway Safety recommend that the task of producing a schedule for this work, if not already instituted, be given prompt attention and

action, as appropriate, by regions, divisions, and States leading to the early advancement and completion of the grade crossing signing and marking program. Comments on the status and progress being made in this program shall be included by each division office in this monthly narrative report to Headquarters until all public grade crossings in the State are properly signed and marked.

/s/ Joseph W. Burdell, Jr.
W. J. WILKES, Director
Office of Engineering

/s/ James L. Foley
J. L. FOLEY, JR., Director
Office of Highway Safety

Federal Highway Administration
HNG-14/HHS-10:JEKirk:adj; 60104:9/29/76

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No. 99-312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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IN THE

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OCTOBER TERM, 1999

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NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

---

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association of approximately 50,000 trial attorneys practicing throughout the country. ATLA members primarily represent injured victims and their families, including those involved in railroad grade crossing accidents. Historically, the states have provided legal remedies for wrongful injury through common law and statutory tort actions. ATLA is concerned that defendants have urged an overly-broad and unwarranted application of the doctrine of federal preemption to eliminate these state tort remedies.

The importance of the issue in this case extends far beyond the parties. Appellant advocates an application of federal preemption that exceeds the limited scope recognized by this Court, and ignores the well-settled presumption against preemption. The result would be to transform a federal statute that was designed to increase safety at railroad crossings into a shield against liability for harm caused by negligent failure to install warning devices. In ATLA's view, such a result is contrary to the values of federalism and the fundamental right of injured victims to obtain legal redress.

SUMMARY OF THE ARGUMENT

The primary issue in this case is whether the Federal Railroad Safety Act, 49 U.S.C. § 20106, preempts Respondent's state law inadequate signalization claim. In enacting this statute, Congress addressed a serious and widespread problem of injuries and deaths in grade crossing collisions. Congress made federal funds available to assist railroads in fulfilling their common law duty to provide adequate signalization. Congress plainly intended railroads to improve the safety of grade crossings. It would indeed be a bitter irony if a regulation enacted to enhance safety and improve the level of protection at railroad grade crossings

became the source of the total abrogation of the railroads' responsibility for safety at those crossings.

In this Amicus brief, ATLA addresses five related issues. First, Amicus stresses the heavy presumption against the preemption which Petitioner seeks. The presumption against preemption is based upon Congressional intent and prior decisions of this Court.

Second, Amicus asks the Court to adopt the two-part test for preemption set forth in the Sixth Circuit's *Shanklin* opinion, and further urges the Court to add a third part to this test. The Sixth Circuit's two-part test provides that state common law inadequate signalization claims may be preempted where (1) federal funds have been expended at the crossing in question, and; (2) the Secretary of Transportation has approved the existing warning devices. Amicus urges the Court to adopt a third and equally important part for this test: that the devices approved by the Secretary be installed and operating. The Sixth Circuit did not consider this third element, installation and operation of the approved devices, because Petitioner failed to prove the second condition, i.e., that the Secretary had approved signalization at the crossing in question. Allowing preemption to be based solely upon the Secretary's approval of warning devices would subject the public to unnecessary, unacceptable and unintended risks.

Third, Amicus points out that a state's expenditure of federal funds to implement a state "minimum protection program" cannot be the basis for federal preemption. In the present case, Tennessee's minimum protection program merely complied with the Manual on Uniform Traffic Control Devices for Streets and Highways warning requirements. This Court's *Easterwood* decision holds that preemption cannot be based upon compliance with the MUTCD. Further, because the minimum protection programs of the different states vary greatly, a rule basing preemption on them is not workable.

Fourth, Amicus raises the issue whether preemption of claims at a given crossing is permanent. The fact that claims are preempted in one case does not necessarily mean that claims are forever preempted at that crossing, as circumstances bearing directly on the Secretary's signalization approval may change. The option of revisiting the Secretary's approval, and thus the entire preemption issue, must be left open.

Fifth and finally, the Court should reject the argument that under 23 U.S.C. § 409 Petitioner cannot comply with the Sixth Circuit's opinion. The Sixth Circuit opinion requires railroads, in order to prove preemption, to demonstrate the Secretary's approval of the signalization at the crossing. Petitioner argues that it cannot make this showing because the documents necessary to prove the Secretary's approval are privileged under 23 U.S.C. § 409. Petitioner's argument fails because it reads 23 U.S.C. § 409 far too broadly. This Court should adopt the Sixth Circuit's narrow interpretation, which is that § 409 does not protect FHWA approval documents. The Court should also find that § 409 does not protect documents showing installation and operation of the approved devices. Finally, the Court should adopt the Sixth Circuit's implicit ruling that § 409 covers only those documents explicitly listed in 23 U.S.C. §§130, 144 and 152.

ARGUMENT

INTRODUCTION

On March 25, 1999, National Transportation Safety Board Chairman Jim Hall testified before Congress that "collisions between trains and vehicles or pedestrians at highway grade crossings are far too common."[2] According to

[2] Testimony Regarding Grade Crossing Safety, Before the Subcommittee on Surface Transportation and Merchant Marine of the Senate Committee on Commerce, Science and Transportation, March 25, 1999. (statement of Jim Hall, NTSB Chairman). Available online at www.ntsb.gov/speeches/jhc990325.htm and WESTLAW at 1999 WL 8086013.

the Federal Railroad Administration, in 1996 there were 4,054 accidents involving highway vehicles at grade crossings.[3] In 1998, there was a collision between a train and a car or truck every 160 minutes[4].

There are more than 259,000 highway/rail grade crossings in the United States.[5] Two-thirds of these crossings are "passive," that is, lacking automatic warning devices (such as gates and flashing lights). The grade crossing at which Respondent Dedra Shanklin's husband was killed was a "passive" crossing.

Passive crossings account for more than 60 percent of crossing deaths each year[6]. In 1996, 247 people were killed in collisions at passive crossings.[7]

The accidents and deaths occurring at our nation's passive grade crossings can be sharply limited by better signalization. Installation of automatic gates and lights at passive crossings reduces the possibility of accidents by

[3] National Transportation Safety Board, "Safety Study, Safety at Passive Grade Crossings," Vol. 1: Analysis at Ch. 1, p.5 (PB98-917004 NTSB/SS-98/02, 1998), citing United States General Accounting Office, "Railroad safety: status of efforts to improve railroad crossing safety," at 33 (GAO/RCED-95-191, 1995).

[4] Jim Hall, Congressional testimony, March 25, 1999, *supra* note 2.

[5] *Id.*

[6] Testimony Regarding Automatic Train Control Before the Subcommittee on Railroads of the House Committee on Transportation and Infrastructure, and the Subcommittee on Technology of the Committee on Science, March 27, 1996 (statement of Jim Hall, NTSB Chairman). Available online at www.ntsb.gov/speeches/jh960327.htm.

[7] NTSB, "Safety Study, Safety at Passive Grade Crossings," *supra* note 3, at 33.

90%.[8] Adequate signalization saves lives while inadequate signalization takes them.

State common law uniformly places a duty on railroad companies to provide adequate signalization at grade crossings. Congress has made federal funds available to fund signalization improvement, which helps railroads to fulfill their common law duty. Petitioner now asks the Court to adopt a rule which would preempt state court inadequate signalization claims based on this expenditure of federal funds, from which railroads already reap substantial benefit. The effect of such a rule would essentially be to immunize railroads from liability at grade crossings. It is remarkable indeed that the railroad would attempt to use the expenditure of federal funds, which by itself affords railroads substantial benefit, as a basis for preemption.

I. THERE IS A STRONG PRESUMPTION AGAINST PREEMPTION.

This Court has consistently applied a heavy presumption against preemption, and has instructed that when Congress legislates in a field that states have traditionally occupied, the Court

> start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), quoted in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Because "the regulation of health and safety matters is primarily and historically, a matter of local concern," *Hillsborough County v. Automated Medical Laboratories,*

[8] California Public Utilities Commission, "The Effectiveness of Automatic Protection in Reducing Accident Frequency and Severity at Public Grade Crossings in California," June 30, 1974 (reprint ed., Federal Highway Administration, U.S. Dept. of Transportation, August 1975).

Inc., 471 U.S. 707, 719 (1985), the presumption against preemption "is particularly apt" in the area of railroad safety. *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991).

There is a "basic assumption that Congress did not intend to displace state tort law," *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). This rule is an essential principle of judicial restraint that preserves our system of federalism by "avoiding unintended encroachments on the authority of the States." *CSX Transp. Inc. v. Easterwood,* 507 U.S. 658, 664 (1993); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Title 49, United States Code, § 20106, the preemption statute at issue in this case, contains an express preemption clause.[9] This Court has held that the heavy presumption against preemption mandates a narrow construction of express preemption provisions. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The heavy presumption against preemption is also particularly applicable to 49 U.S.C. §20106, in that the plain language of the preemption provision chosen by Congress "displays considerable solicitude for state law". *Easterwood,* 507 U.S. at 665.

The heavy presumption against preemption preserves the right of redress for those who have been wronged, a cornerstone of our judicial system. Early in our history, Chief Justice Marshall described the importance of this right:

> the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an

[9] "A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. §20106.

> injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

This common-law right of access to justice preceded even the Constitution.[10] It is so fundamental that this Court has recognized that "[i]t is the duty of every State to provide, in the administration of justice, for the redress of private wrongs". *Missouri Pacific Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885).

The right to a remedy is also explicitly guaranteed in thirty-seven state constitutions. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 615 n.218 (1981); Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964). The continued vitality of these state constitutional protections of tort remedies is reflected in the decisions of state supreme courts striking down state legislation which sought to limit recoverable damages. *See, e.g., Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance,* 507 So. 2d 1080 (Fla. 1987); *Kansas Malpractice Victims Coalition v. Bell,* 757 P.2d 251 (Kan. 1988); *Lucas v. United States,* 757 S.W.2d 686 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

Because the right of the people to obtain redress for wrong is so essential to our form of government, and because state law provides the primary mechanism for protecting this

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[10] Lord Coke traced this right to the Magna Carta, restating it in the form that is reflected in many state constitutions:

> Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay.

Edward Coke, SECOND INSTITUTE 55-56 (4th ed. 1671).

right, any attempt to preempt state law claims must be closely scrutinized. In *Medtronic*, this Court narrowly interpreted an express preemption provision, observing that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 518 U.S. at 487, quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

The presumption against preemption requires far more than the paltry showing made by the Petitioner in this case. Amicus urges the Court to embrace the arguments set forth in the Respondent's brief, and to reject the claim of preemption.

II. THE COURT SHOULD ADOPT THE SIXTH CIRCUIT'S TWO-PART PREEMPTION TEST, AND ADD A THIRD REQUIREMENT THAT WARNING DEVICES APPROVED BY THE SECRETARY MUST BE "INSTALLED AND OPERATING"

In *Shanklin v. Norfolk Southern Railway Company*, 173 F.3d 386 (6th Cir. 1999), the Sixth Circuit adopted the Seventh Circuit's two-part test for preemption in grade crossing cases:

> Thus, the Seventh Circuit in *Shots* [*v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994)] announced a two-part test for preemption in grade crossing cases: (1) establish whether subsection (b)(3) or (4) applies at all (i.e., whether federal funding participated in the installation of warning devices at the crossing in question); and (2) establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.

Amicus asks the Court to adopt this test, but to add a third requirement, that the devices approved by the Secretary be installed and operating before preemption can occur. Several courts have recognized that the actual installation and operation of devices approved by the Secretary is a prerequisite to preemption. In *St. Louis Southwestern R.R. Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), *cert. denied*, 514 U.S. 1110 (1995), the Eighth Circuit explained why installation and operation is required:

> Before preemption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices. A plan to install devices and federal approval of a plan do not protect the public, however. The Railway's interpretation that federal approval triggers preemption would leave the public unprotected between the time of approval and the time the prescribed devices are installed and operating. This can be a substantial period of time. In this case, it was fifteen months. To encourage prompt installation of federally prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed.

39 F.3d at 867. The *Malone Freight Lines* court based this holding on its interpretation of *Easterwood*:

> Rather than looking to federal approval or fund allocation as triggering preemption, the Supreme Court [in *Easterwood*] focused on the equipment installed at the crossing. Because the only equipment installed was circuitry, which was not a passive or active warning device as defined in 23 CFR § 646.204(i)-(j), the Court held the claim was not pre-empted.

Id. See CSX Transp. Inc. v. Easterwood, 507 U.S. at 672 ("the only equipment installed was the motion-detection

circuitry"); *Bryan v. Norfolk and Western Ry. Co.*, 154 F.3d 899, 904 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 921 (1999) ("once . . . [approved] safety devices . . . are installed and operating, state law negligence claims are preempted by federal regulations . . ."); *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 190 (1997) ("once warning devices paid for with federal funds are installed and operating, the railroad's common-law duty of care ceases, and it is entitled to the benefit of federal preemption").

In both the Sixth Circuit's *Shanklin* opinion and in *Shots*, the Secretary's approval of warning devices was absent, meaning that the second portion of the two-part test was not met. Because the second part was not satisfied in either case, there was no need for either court to address the "installed and operating" issue. As the Eighth Circuit recognized in *Malone Freight Lines*, however, where the Secretary has approved signalization, the approved devices must be installed and operating before preemption can occur.

Amicus requests that when adopting the Sixth Circuit's two-part preemption test (adopted from the Seventh Circuit's *Shots* opinion), the Court add a third requirement, that the warning devices approved by the Secretary be installed and operating before preemption can occur.

III. THE EXPENDITURE OF FEDERAL FUNDS TO IMPLEMENT A STATE'S "MINIMUM PROTECTION PROGRAM" CANNOT BE A BASIS FOR FEDERAL PREEMPTION.

Prior to the accident which killed Eddie Shanklin, the state of Tennessee implemented a "minimum protection program", in order to bring its crossings into conformance with the last sentence of 23 U.S.C. § 130(d).[11] *Shanklin v.*

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[11] 23 U.S.C. § 130(d) provides:

> (d) Survey and Schedule of Projects. - Each State shall conduct and systematically maintain a survey of all

Norfolk Southern Railway Company, 173 F.3d at 388. States must comply with 23 U.S.C. § 130 in order to obtain federal funding for railroad crossing improvements. Congress added subsection (d) in 1987 (Pub. L. 100-17). 23 U.S.C. § 130 ("Amendments").

Subsection (d) requires, at a minimum, that every crossing be equipped with "signs." In 1987, the Tennessee Department of Transportation ("TDOT") installed reflectorized "crossbucks" at the Oakwood Church Road crossing, apparently to satisfy § 130(d)'s mandate for "signs."[12]

According to the Sixth Circuit's opinion, the only warning provided at the Oakwood Church Road Crossing under Tennessee's "minimum protection plan" was crossbucks. 173 F.3d at 388. In its brief, Petitioner alleges that Tennessee's "minimum protection program" also required two advanced warning signs and two advanced pavement markings at each crossing, in addition to reflectorized crossbucks. Petitioner's Brief at 20-21.

Amicus assumes, for the sake of argument, that Petitioner's interpretation of Tennessee's "minimum protection program" is accurate, and that this program required two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing. As such, the warning devices at the Oakwood Church Road Crossing would have complied with the Manual on Uniform

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> highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. *At a minimum, such a schedule shall provide signs for all railway-highway crossings.* [emphasis added]

[12] A "crossbuck" is the "x" shaped white sign bearing the words "Railroad Crossing", commonly seen posted on roads approaching railroad crossings.

Traffic Control Devices for Streets and Highways ("MUTCD").

In *CSX Transp. Inc. v. Easterwood*, 507 U.S. at 670, this Court held that compliance with the MUTCD standards cannot serve as a basis for preemption. Petitioner argues, however, that Tennessee's "minimum protection program" exceeded the requirements of the MUTCD. This statement is wrong.

Assuming that Petitioner's characterization of the protective devices present at the Oakwood Church Road Crossing is accurate, the crossing complied with the MUTCD, which requires the three types of passive warnings: (1) crossbucks (MUTCD § 8B-2); (2) railroad advance warning signs (MUTCD § 8B-3)[13], and; (3) pavement markings (MUTCD § 8B-4).[14] *Easterwood* plainly holds that compliance with the MUTCD cannot justify preemption, and the Tennessee minimum protection program did nothing more than comply with the MUTCD.

Amicus is concerned that the Court might consider a rule that would allow preemption to occur based on a state's expenditure of federal monies to implement a "minimum protection plan." Such a rule would be wholly unworkable for several reasons.

First, there are disparities among the "minimum protection plans" of the various states. Tennessee's program, for example, required two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing. Indiana developed a minimum protection program in 1975, pursuant to which many of its

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[13] A railroad advance warning sign is a circular yellow sign, 36 inches in diameter, depicting a black cross and the letters "RR". MUTCD § 8B-3.

[14] "Pavement markings in advance of a grade crossing shall consist of an X, the letters RR, a no passing marking (2-lane roads), and certain traverse lines". MUTCD § 8B-4.

crossings were equipped with reflectorized crossbucks, but nothing more. *Shots v. CSX Transp., Inc.*, 38 F.3d 304, 306 (7th Cir. 1994). In the 1990's, Texas implemented a similar program, which required that crossbucks at all passive grade crossings be fitted with retroreflective paint.

Addressing Indiana's minimum protection program, Judge Posner noted in *Shots* that "minimum is not a synonym for optimum, or even adequate." 38 F.3d at 308. Judge Posner further observed that, as a result of minimum protection programs, "adequate safety might be sacrificed at some crossings to enable minimum safety to be achieved at all." *Id.* He described minimum protection programs as merely "a step on the road to adequate safety rather than a determination by [states] or the federal Secretary of Transportation as to what safety devices would be adequate . . ."). *Id.* at 309.

Evidence taken in a Texas grade crossing case[15] also demonstrates that, by their very definition, minimum protection plans are just that -- *minimum*. They are not *adequate* protection programs.

The minimum protection program which Texas implemented in the 1990's provided minimum protection at Texas' grade crossings: reflectorized tape on all crossbucks. The program was not intended to take the place of or even include engineering studies required by 23 C.F.R. §646.214(b)(3) and (b)(4). It was not intended to make grade crossings in Texas adequately safe. This was made clear in the testimony of Richard Gumtau, the Regional Highway Safety Engineer for the Federal Highway Administration (region of Texas, New Mexico, Oklahoma, Arkansas and Louisiana) from 1978 to 1997, in the Texas case:

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15 *Chorn v. Atchison, Topeka & Santa Fe Ry. Co.*, Cause No. 95-811, Texas, 171st Judicial District Ct., El Paso County.

Q. Sir, with respect to crossings that receive the reflectorized tape on the back of cross bucks, did the Federal Highway Administration conduct any independent investigation of any of the crossings to determine whether or not the addition of the tape to existing crossings would make the crossing safe?

A. None that I am aware of.

Q. And in your position as the person for the region responsible for oversight, would it be your belief that if such a program had taken place, you would have been familiar with it?

A. Yes, sir.[16]

Q. Sure. You've indicated that the purpose of the use of the reflectorized tape was to enhance the visibility of the cross bucks at night; correct?

A. Correct.

Q. And you've indicated that in order to determine whether or not crossings needed automatic signals, the normal procedure was for a state diagnostic team to do an evaluation and then make recommendations based on evaluation.

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16 Deposition Testimony of Richard O. Gumtau at p. 15, ll. 4-15, *Chorn v. Atchison, Topeka & Santa Fe Ry. Co.*, Cause No. 95-811, Texas, 171st Judicial District, El Paso County (taken March 25, 1998).

A. Correct.

Q. My question is: In authorizing the use of money to put reflectorized tape on cross bucks on passive crossings that didn't have automatic gates, the Federal agency wasn't in any way making a determination as to whether or not these crossings needed or didn't need gates and lights; correct?

A. That's correct.[17]

Q. (By Mr. Haralson) Sir, would it be correct that it was not the expectation of your agency that the tape would be used in lieu of or in place of automatic gates and lights if automatic gates and lights were needed at a crossing; correct?

A. That is correct.[18]

Q. Sir, to make that question a little broader: To your knowledge, did your agency or any Federal agencies in any of the states in any of your regions, or in the region that you were responsible for, attempt to make any individual determination as to whether or not the use of reflecting tape made the crossings safe and eliminated the need for automatic signals of any kind?

[17] *Id.* at p. 20, ll. 8-24.

[18] *Id.* at p. 21, ll. 2-7.

A. Not that I'm aware of.

Q. To your knowledge, did your agency or any Federal agency require the State of Texas to do any independent evaluation of each of the crossings before applying the retroreflectorized material to the cross bucks?

A. Not that I'm aware of.[19]

Darin Kosmak, the Texas Department of Transportation employee who served as liaison between his department, the FRA and the railroads, also testified in *Chorn*. Kosmak, who was responsible for overseeing the expenditure of federal funds allocated from the FRA to the State of Texas for rail-highway grade crossing improvements, also testified that Texas' program was not designed to replace or include engineering studies required by 23 C.F.R. §646.214(b)(3) and (b)(4), and that the program was not intended to make any crossings in Texas adequately safe:

Q. Okay. You've indicated, sir, that the State of Texas has never sent a diagnostic team to the crossing to do a diagnostic-type evaluation and, to the best of your knowledge, the State has never sent anyone qualified in traffic engineering to the Lower Street crossing to do any type of traffic engineering evaluation of the crossing to see whether or not the gates -- or the passive devices were adequate based on the traffic engineering study; is that correct?

[19] *Id.* at p. 26, ll. 9-23.

A. Yes, that's correct.[20]

Q. Okay. Then, if you would, look over on Page 3, the middle of the page, starting with the paragraph that starts out, "To the best" -- "To the best of my knowledge, neither the Federal Highway Administration or the State of Texas conducted any independent investigation of any of the crossings that received Federal funds for the installation of retroreflectorized tape to determine whether or not the addition of the tape to the existing cross bucks made the crossing safer," correct?

A. Yes, that's correct.

Q. And there was no attempt on the part of the State of Texas or, to your knowledge, the FH -- Federal Highway Administration or the Secretary of Transportation to make any kind of individual study of each one of these crossings where the passive devices were brought up to standard or where the reflectorized tape was put on them to see whether or not those crossings needed gates and lights, correct?

A. That's correct.

Q. That was not the purpose of either program, correct?

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[20] Deposition Testimony of Darin Kosmak at p. 137-138, ll. 20-5, *Chorn v. Atchison, Topeka & Santa Fe Ry. Co.*, Cause No. 95-811, Texas, 171st Judicial District Ct., El Paso County (taken October 15, 1998).

A. That's correct, uh-huh.[21]

Because state "minimum protection" programs do not address the adequacy of signalization at particular crossings, compliance with such programs cannot serve as a basis for preemption.

It is interesting to note that Texas' minimum protection program was implemented in order to comply with a Texas statute requiring reflectorized crossbucks.[22] Even though the upgrade was required by state law, and even though Texas common law requires railroads to provide adequate signalization at crossings, federal funds were used to reflectorize Texas' crossbucks. Had railroad money been used to reflectorize Texas' crossbucks, federal monies could have been used to install automatic gates and lights at the crossing where the accident occurred.[23] Installation of automatic gates and lights would likely have prevented Mr. Chorn's death.

The only way in which a state's minimum protection program could justify preemption would be if the state adopted and fully implemented the federal requirements for grade crossing safety, set forth at 23 C.F.R. 646.214(b)(3) and (b)(4).

IV. PREEMPTION OF CLAIMS AT A GIVEN CROSSING IS NOT NECESSARILY PERMANENT.

Amicus concedes that inadequate signalization claims are preempted at a crossing where signalization approved by the Secretary is installed and operating.

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[21] *Id.* at pp. 121-122, ll. 6-4.

[22] *Id.* at pp. 136, ll. 12-18.

[23] *Id.* at pp. 127-128, ll. 15-3.

Amicus points out, however, that preemption of claims at a given crossing in one instance does not necessarily mean that claims will always be preempted. The fact that signalization at a given crossing becomes adequate does not mean that it will always remain adequate. This is particularly true of crossings for which the Secretary approves passive warning devices pursuant to 23 C.F.R. §646.214(b)(4). Should circumstances change at such a crossing, causing it to fall within subsection (b)(3)(i), for example, the Secretary's previous approval of passive devices would be moot and claims would no longer be preempted.

Likewise, at crossings falling under subsection (b)(3)(ii), where the Secretary approves passive warning devices based on the recommendation of a diagnostic team (even though the (b)(3)(i) factors are present), circumstances could change rendering the diagnostic team's decision moot.

The Court need not decide whether preemption attaches permanently to a crossing once devices approved by the Secretary are installed and operating. Amicus simply points out that this is an issue which may arise in the future.

V. 23 U.S.C. §409 WOULD NOT PREVENT RAILROADS FROM PROVING PREEMPTION.

The Sixth Circuit opinion requires that, to prove preemption, railroads must prove that the Secretary approved the signalization which was present when the collision occurred. *Shanklin*, 173 F.3d at 394. As discussed in Part II of this brief, the Court should also require the railroad to prove that the warning devices approved by the Secretary are installed and operating.

Petitioner argues that Title 23 United States Code, § 409, prohibits it from producing the evidence necessary to show the Secretary's approval, and that the Sixth Circuit opinion is therefore unworkable. Under Petitioner's reading of § 409 (that "all evidence relevant to preemption is legally

inadmissible and not even discoverable" under § 409),[24] the privilege would also protect documents showing that the approved devices are installed and operating.

Title 23 United States Code, § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

A. It Is Appropriate For The Court To Address The 23 U.S.C. § 409 Issue.

1. *The Court should address the 23 U.S.C. § 409 issue because it is a "subsidiary question fairly included" in Petitioner's federal preemption argument*

Whether the 23 U.S.C. § 409 privilege covers documents showing the Secretary's approval of warning devices is a "subsidiary question fairly included" in Petitioner's federal preemption argument under Rule 14.1(a) of the Supreme Court Rules, which provides, in pertinent part:

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[24] Petitioner's Brief at 43.

> The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

See Yee v. *Escondido*, 503 U.S. 519, 535 (1992) ("[u]nder this Court's Rule 14.1(a), 'questions set forth in the petition, or fairly included therein, will be considered by the Court'"); *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995) (the Court will address issues "fairly included in the question presented"); *United States* v. *Mendenhall*, 446 U.S. 544, 551-552, n. 5 (1980)(opinion of Stewart, J.) (where the determination of a question "is essential to the correct disposition of the other issues in the case," this Court treats it as "fairly comprised" by the questions presented in the petition for certiorari).

Not only is the § 409 issue "fairly" included in Petitioner's brief, it is plainly included (Petitioner's Brief at 42-48). Petitioner argues that it cannot be required to prove the Secretary's approval of warning devices because the documents necessary to make this showing are privileged under § 409. The scope of the § 409 privilege is a "subsidiary question fairly included" in Petitioner's federal preemption argument. The Court should therefore address it.

2. *The Court should address the 23 U.S.C. § 409 privilege issue because this was an essential basis for the decision below, necessary for resolving the underlying question of federal preemption*

This Court will address issues which were the basis for the decision below. *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379, n. 5(1996) ("[w]e generally do not address arguments that were not the basis for the decision below. See *Peralta* v. *Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988)"). The Court also addresses issues "essential

to [the] analysis of the Court of Appeals". *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978).

The Court will also address issues necessary to resolve the question presented. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (declining to address an issue the resolution of which was "unnecessary to our decision on the narrow question presented"). *See also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788 n.8 (1990) and *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, n. 2 (1981).

The Sixth Circuit concluded that the § 409 privilege does not apply to documents showing the Secretary's approval of warning devices, and this was an essential basis for that court's decision. It was necessary for the Sixth Circuit to reach this conclusion to resolve the underlying issue of federal preemption. Had the Sixth Circuit adopted the Petitioner's broad view that the § 409 privilege applies to documents showing the Secretary's approval of warning devices, the result in *Shanklin* would have been different, because railroads could not be required to prove the Secretary's approval with prohibited documents.

Thus, resolution of the scope of the § 409 privilege was an essential basis for the Sixth Circuit's opinion, and necessary to resolving the underlying question of federal preemption.

B. This Court Must Construe The § 409 Privilege Very Narrowly Because There Is No "Clear And Manifest Purpose" Of Congress That It Be Interpreted Broadly

This Court presumes that privileges, like the § 409 privilege, are construed narrowly:

> [P]rivileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."

United States v. Nixon, 418 U.S. 683, 710 (1974).

Moreover, as discussed in argument Part I of this brief, there is a heavy presumption against federal preemption of state law. The § 409 privilege, if applied, would preempt state law. Accordingly, § 409 must be interpreted narrowly, absent a "clear and manifest purpose of Congress" to the contrary. *CSX Transp., Inc. v. Easterwood*, 507 U.S. at 663-64.

Congress' purpose in passing § 409 is neither clear nor manifest, as various state and federal court opinions recognize. In *Light v. State of New York*, 149 Misc. 2d 75, 560 N.Y.S.2d 962 (Ct. Cl. 1990), the New York Court of Claims, having considered statute's legislative history, including H. Conf. Rep. No. 100-27, reprinted in 1987 U.S. Code Cong. & Admin. News 66, 156-57, noted that there is "no record of discussion or comments as to the specific legislative purpose" of § 409. 149 Misc. 2d at 79, 560 N.Y.S.2d at 964 [25]

In *Southern Pacific Transp. Co. v. Yarnell*, 181 Ariz. 316, 890 P.2d 611 (1995), the Arizona Supreme Court observed that, "[s]o far as we are aware, the history of 23 U.S.C. § 409 is nonexistent." 181 Ariz. at 318, 890 P.2d at 613. *See also Department of Transportation v. Superior Court*, 47 Cal. App. 4th 852, 857, 55 Cal. Rptr. 2d 2, 5 (1996) (declining to adopt a broad reading of § 409 in the absence of "clear" Congressional intent).

In contrast, the Utah Court of Appeals determined in *Duncan v. Union Pacific R. Co.*, 790 P.2d 595, 597 (Utah App. 1990) that the legislative purpose of § 409 can be "gleaned" from H. Conf. Rep. No. 100-27. It concluded that

[25] The *Light* court speculated that the congressional intent behind the statute was "merely to keep the record keeping required by Federal funding provisions from providing an additional, virtually no-work tool for direct use in private litigation." 149 Misc. 2d at 80, 560 N.Y.S.2d at 965.

the legislative intent was "to facilitate candor in administrative evaluations of highway safety hazards". *Id.*

In *Guillen v. Pierce County*, 96 Wash. App. 862, 870, 982 P.2d 123, 128 (1999), the Court of Appeals for the State of Washington noted that

> [S]ection 409's purpose is "to prohibit federally required record-keeping from being used as a 'tool. . . in private litigation,'"[citation omitted], thereby facilitating "the free flow of safety-related information"[citation omitted] and "candor in administrative evaluations of highway safety hazards." [citation omitted]

Finally, in *Tardy v. Norfolk S. Corp.*, 103 Ohio App. 3d 372, 377, 659 N.E.2d 817, 819 (1995), the Ohio Court of Appeals, without citing any authority, concluded that the legislative intent behind § 409 is "obvious": to encourage "candor" on the part of railroads in reporting hazardous crossings.

What these cases establish is that Congress' intent in passing 23 U.S.C. § 409 is not clear. Because there is no "clear and manifest purpose of Congress" with respect to § 409, this Court must interpret it narrowly. *Easterwood*, 507 U.S. at 663-64, *Medtronic, Inc. v. Lohr*, 518 U.S. at 485.

Congress amended 23 U.S.C. § 409 in 1995, adding the words "and collected" after the word "compiled" to the statute. The amendment included the following legislative history:

> Sec. 328. Discovery and admission as evidence of certain reports and surveys.
>
> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 to title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not

> be subject to discovery or admitted into evidence in a Federal or State court proceeding . . . .

H. R. Rep. No. 104-246 (1995), reprinted in 1996 U.S.C.C.A.N. 522.

This legislative history does not clarify which documents Congress intended to cover under the § 409 privilege. According to this legislative history, raw data collected for the sole purpose of being included in a "formal or bound report" is not discoverable before it is placed in such a report.

Because there is no "clear and manifest" Congressional intent regarding § 409, this Court must interpret is narrowly.

C. The Court Should Adopt The Sixth Circuit's Narrow Reading Of § 409.

The Sixth Circuit rejected Petitioner's overly broad interpretation that "all evidence relevant to preemption is legally inadmissible and not even discoverable" under § 409. *Shanklin*, 173 F.3d at 396 ("[w]e conclude that Norfolk Southern misreads the requirements of §409").

In *Shanklin*, the Sixth Circuit correctly interpreted § 409 narrowly. It clearly ruled what § 409 does *not* cover: documents showing the Secretary's approval of warning devices. Further, the Sixth Circuit appears to define what *is* covered under § 409: the reports and surveys specifically mentioned in 23 U.S.C. §§ 130, 144 and 152.

As to documents showing the Secretary's approval, *Shanklin* plainly holds that the § 409 privilege does not apply:

> We are satisfied that the FHWA's approval, i.e., the approval of the Secretary or his agent, of the use of passive warning devices at a particular crossing is not barred from discovery or admission into evidence by § 409.

Shanklin, 173 F.3d at 397. FHWA approval documents are not privileged under § 409 because they are *not* explicitly mentioned in 23 U.S.C. §§ 130, 144, 152 or 409:

> Section 409 does not, however, mention the Secretary's approval of any projects as to which these "reports, surveys, schedules, lists, or data" have been "compiled or collected"

Id. Under this rationale, documents proving installation and operation of the approved devices likewise would not be privileged under § 409 because such documents are not explicitly mentioned in 23 U.S.C. §§130, 144 or 152.

The Sixth Circuit also appears to define the narrow group of documents which *are* privileged under § 409: the reports and surveys explicitly mentioned in 23 U.S.C. §§ 130, 144 and 152, which *Shanklin* identifies as: (1) the surveys to establish and implement particular railway-highway schedules, required by 23 U.S.C. §130(d); (2) the annual report required of each state by § 130(g); (3) the inventory of bridges required by 23 U.S.C. § 144(b); (4) the biannual report required of the Secretary of Transportation under § 144(i); (5) the engineering survey of public roads to establish and implement an improvement schedule, required by 23 U.S.C. § 152(a), and; (6) the annual highway hazard report to Congress required of each state under §152(g). *Shanklin*, 173 F.3d at 396-97. These documents are privileged under § 409 because:

> Section 409 explicitly prohibits these "reports, surveys, schedules, lists or data compiled or collected" from being discovered or admitted into evidence.

Id.

The Arizona Supreme Court reached the same conclusion regarding what § 409 covers in *Southern Pacific Transp. Co. v. Yarnell*, 181 Ariz. at 319, 890 P.2d at 614:

> [T]he documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of §§130, 144, and 152, and no others.

The Sixth Circuit clearly ruled that FHWA approval documents are not privileged under § 409 and Amicus urges the Court to adopt this rule. Amicus further asks the Court to rule that § 409 does not apply to documents showing installation and operation of devices approved by the Secretary.

The Sixth Circuit also appears to conclude, as the Arizona Supreme Court did, that the only items privileged under § 409 are the reports and surveys specifically mentioned in 23 U.S.C. §§ 130, 144 and 152. Amicus asks the Court to adopt this rule, as well. Such a rule is entirely consistent with the plain wording of the statute, and the plain wording of a statute contains the best evidence of Congress' intent. *CSX Transportation, Inc. v. Easterwood,* 507 U.S. at 664. Under the "plain meaning" canon of statutory construction, the meaning of a statute is to be determined from the plain meaning of the terms. *United States v. Clarke*, 445 U.S. 253, 254 (1980).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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In the

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF NORTH CAROLINA, CALIFORNIA, COLORADO, ILLINOIS, KANSAS, MINNESOTA, MISSOURI, NEVADA, NEW MEXICO, OKLAHOMA, RHODE ISLAND, AND WEST VIRGINIA, IN SUPPORT OF RESPONDENT

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In the

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,

Respondent.

BRIEF *AMICUS CURIAE* OF THE STATES OF NORTH CAROLINA, CALIFORNIA, COLORADO, ILLINOIS, KANSAS, MINNESOTA, MISSOURI, NEVADA, NEW MEXICO, OKLAHOMA, RHODE ISLAND, AND WEST VIRGINIA, IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici curiae, the listed State Attorneys General, respectfully submit this brief in support of Plaintiff-Respondent Dedra Shanklin. Amici have a strong interest in preserving a proper balance of power between States and the federal government. Among the most basic powers of State government is the establishment of laws designed to safeguard the public health, safety, and welfare. And among the most important of those laws is the common law of negligence.

While State and federal regulations can encourage safe behavior, tort law provides a critical additional deterrent to industry actions which jeopardize citizen safety – and it is often the only compensation for injured citizens.

The number of citizens killed and injured in crossing accidents throughout this country is unacceptably high. Every 90 minutes, a vehicle and a train collide at one of this country's 290,000 highway-rail grade crossings. In 1994, more than 600 people died, and more than 1,900 were injured as a result of such crashes. By inappropriately invoking the doctrine of federal preemption, petitioner's position threatens citizens' ability to obtain redress for their injuries and would reduce railroads' incentive to make railroad crossings safe enough to protect them in the first place.

STATEMENT OF THE CASE

A. RAILROADS HAVE TRADITIONALLY HAD A STATE LAW DUTY TO PROVIDE ADEQUATE WARNING DEVICES AT GRADE CROSSINGS.

Dating back to the earliest days of rail travel, this Court has recognized a common law duty of railroads to warn highway travelers about the hazards of railway-highway grade crossings. *See Continental Improvement Co. v. Stead*, 95 U.S. 161, 164 (1877) (approaching train must give "reasonable and timely warning" to the traveling public). If a crossing is more than ordinarily hazardous, a railroad must take such actions as dictated by reasonable care and prudence, which may require placing a flagman or providing additional warning devices, such as gates. *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 416-420 (1892); *see generally* 74 C.J.S. § 728 (1951). Even against

the modern federal regulatory backdrop, a railroad is presumed to retain its "duty to take all reasonable precautions to maintain grade crossing safety." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 665 n.5 (1993).

The Federal Railroad Administration (FRA) has expressly acknowledged railroads' common law duty to provide warnings. In 1978, the FRA's annual report acknowledged "the current practice of railroads assuming total liability for rail-highway crossing accidents." 1978 Annual Report by the President to the Congress on the Administration of the Federal Railroad Safety Act of 1970, at 33-34. In 1995, the FRA proposed an administrative rulemaking to remove railroads' common law duty to select safety devices. In its notice of proposed rulemaking, the FRA wrote:

> Some state laws, generally predating the advent of the Federal Rail-Highway Crossing Program, impose a tort law duty upon railroads to maintain safe crossings. In some cases this duty has been interpreted to include a duty to select and install warning systems at hazardous crossings.

Selection and Installation of Grade Crossing Warning Systems; Notice of Proposed Rulemaking, 60 Fed. Reg. 11,649, 11,651 (March 2, 1995). After significant public outcry, the agency decided not to disturb the common law and withdrew the proposed rule, stating that "[t]ermination of this rulemaking is based on public comments and FRA's determination that railroad safety will not be best served by issuance of such a regulation at this time." Selection and

Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42,733 (August 8, 1997).

B. FEDERAL FUNDING OF RAILROAD CROSSINGS.

In 1973, Congress first appropriated funds to improve safety at railway-highway crossings which were not a part of the federal highway system. Highway Safety Act of 1973 (HSA), Pub. L. No. 93-87, 87 Stat. 282. At that time, Congress appropriated $150 million for fiscal year 1974 and $225 million each for fiscal years 1975 and 1976 for the states to distribute for crossing upgrades. *Id.* These funds, and funds authorized in subsequent years, were appropriated on the condition that states develop programs that, at a minimum, would provide signs at all crossings, and would also survey site conditions at all crossings to prioritize more substantial upgrade projects. *Id.* Now codified at 23 U.S.C. § 130(d), the federal conditions provide:

> Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

23 U.S.C. § 130(d).

This subsection created two programs, commonly called the "minimum" program and the "priority" program. The "minimum" program is set forth in the second sentence of § 130(d). By requiring each crossing in the nation to have

crossbuck signs, this provision establishes a minimum, or floor, with which every crossing must comply. The "priority" program, described in the first sentence of § 130(d), requires states to compile information about crossings and develop lists of the crossings most in need of safety upgrades. Regulations implementing and further describing this program are codified at 23 C.F.R. Part 924.

Regulation 23 C.F.R. § 646.214(b)(3) attaches a further condition on federal crossing upgrade funds. It requires that in the presence of certain site conditions, federally funded projects must include automatic gates with flashing light signals, unless the FHWA approves otherwise.[1] Because this regulation

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[1] In pertinent part, the regulation reads:

(3)(I) *Adequate warning devices*, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

23 C.F.R. § 646.214(b)(3)(I).

applies to "any project where Federal-aid funds participate in the installation of the devices," it acts as a condition on federal money, just as Part 924 regulations do. States are to receive federal money for crossing upgrades only if the upgrades conform to the regulation. In this way, the Federal Highway Administration retains some oversight over the federal expenditures. Whereas the Part 924 regulations condition federal spending on implementing certain procedures, subsection 646.314(b)(3) conditions federal spending on having a certain level of safety devices.

Under the Federal Railroad Safety Act of 1970 (FRSA), regulations adopted by the Secretary of Transportation – including regulations adopted pursuant to the HSA – can preempt state law. Specifically, the FRSA provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States
>
> Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106.

C. THE FACTS OF THIS CASE.

In 1987, federal highway funds appropriated under the HSA minimum protection program were used to install reflectorized crossbucks and advance warning signs at the Oakwood Church Road Crossing, in Gibson County, Tennessee. J.A. 102-103. On October 3, 1993, Eddie Shanklin was driving his car across the crossing when he was struck and killed by a Norfolk Southern train. His widow, plaintiff-respondent Dedra Shanklin, filed a state law negligence claim in diversity jurisdiction, alleging, *inter alia*, that "Norfolk Southern failed to provide an adequate warning system or protective devices at the crossing in question, though they were aware of the ultra or extra hazardous local condition and its inherent danger to the unsuspecting motorist expected to use said crossing." J.A. 31.

The crossing did not have active warning devices such as automatic gates and flashing lights, despite the presence of multiple conditions which 23 C.F.R. § 646.214(b)(3) identifies as requiring gates and lights. The district court found:

> The record in this case shows that at least some of the (b)(3) conditions appear to exist at the Oakwood Road crossing. These conditions include high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing.

Cert. Pet. 35A. Petitioner-defendant Norfolk Southern was found 70% negligent at trial. J.A. 47. The verdict was affirmed by the United States Court of Appeals for the Sixth Circuit. Cert. Pet. 1A.

SUMMARY OF ARGUMENT

In an effort to reduce deaths and injuries from trains at railway-highway grade crossings, the Federal Highway Administration (FHWA) provides funds to upgrade warning systems at railway grade crossings in the States. To ensure good stewardship of taxpayers' money, the FHWA sets a "floor," or minimum level, of protection which funded upgrades must meet. At particularly dangerous crossings, the FHWA requires automatic gates with flashing light signals.

Under the applicable statute, Department of Transportation regulations which "cover the subject matter" of state law can preempt state law. The FHWA's regulations do not preempt plaintiff-respondent's state law tort claim of failure to provide adequate warning devices because they do not cover its subject matter.

The regulations do not address railroads' independent and ongoing common law duty of care to provide adequate warning devices at all crossings, including those which have received federally funded upgrades. The regulations' scope is limited to the requirement that crossings be equipped with certain safety devices if federal funds are disbursed. They do not remove railroads' preexisting common law duty of care to the traveling public, which may require safety devices beyond those which have been installed with federal funds.

The regulations do not establish a standard of care which preempts the common law standard. The regulations' use of the term "adequate warning devices" is limited to the funding context in which the regulations operate. While compliance with a federal regulatory guideline is relevant evidence that a railroad has met a standard of care, it is not dispositive. Liability is determined based on the particular facts of individual cases.

Petitioner Norfolk-Southern Railway Company urges the inequitable rule that the existence of a federal program encouraging installation of safety devices at railroad crossings should immunize railroad companies from liability for tortious conduct at crossings which do not even meet the federal requirements. Such a rule is contrary to congressional intent of enhanced safety and is unsupported in law.

ARGUMENT

FEDERAL LAW DOES NOT PREEMPT RAILROADS' COMMON LAW DUTY TO PROVIDE ADEQUATE WARNING DEVICES.

A. NORFOLK SOUTHERN'S POSITION WOULD DRAMATICALLY IMPAIR THE ABILITY OF INJURED PERSONS TO OBTAIN REDRESS, A CONCERN NOT BEFORE THE COURT IN *EASTERWOOD*.

Petitioner Norfolk Southern contends that railroads' longstanding common law duty to provide necessary warning devices at rail crossings is preempted by the federal regulations which require that, when federal funds participate, automatic

gates and flashing light signals must be installed at certain sites. According to Norfolk Southern, railroads no longer have any duty to provide warning devices at any crossing that has received federal funds. At the outset, the extraordinary harmful ramifications of petitioner's position must be understood. If Norfolk Southern's position is adopted:

- One-time federal funding of crossbucks – the "minimum" statutory protection – would immunize railroads from liability, even where railroads breached their common law duty of care by failing to provide safety devices necessary to protect public safety.
- Expenditure of federal money designed to improve crossing safety would have the opposite effect. It would take away railroads' responsibility to upgrade safety devices, regardless of changes in conditions, such as increased traffic and reduced line of sight, which could render a crossing extra-hazardous. This immunity would remove railroads' incentive to ensure the continued safety of their crossings.
- Persons injured due to railroads' failure to provide adequate warning devices would have no remedy whatsoever because the federal regulations provide no alternative remedy to the state law remedies.
- Expenditure of federal funds would preempt not just tort law but *any* state authority recognizing railroads' role in crossing protection. For example, if a state identified a class of crossings at which crossbucks were insufficient to prevent grave risk to its citizens' safety (*e.g.*, crossings where vehicle approach is greater than 40 miles per hour), a state regulation requiring railroads to upgrade such

crossings would be preempted -- even where federal money had funded only minimal crossbucks.[2]

In defense of its position, Norfolk Southern relies heavily on the statement in *Easterwood* that the regulations "cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671. That statement was dictum, however, for the Court concluded that federal funds did not participate at the crossing at which Thomas Easterwood was killed. Moreover, *Easterwood*'s dictum was based on the assumption that federal money would have funded the gates and lights required under 23 C.F.R. § 646.214(b). However, in this case, federal money funded only the minimum crossbuck protection. This case therefore raises a question unanswered by *Easterwood*: Can a state law inadequate warning devices claim be preempted where federal funds participated but did not pay for gates and lights?

Because *Easterwood* did not involve the participation of federal funds, the plaintiff was free to pursue her state law cause of action, and this Court did not have to decide whether to interpret the FRSA preemption provision and HSA regulations in a manner that deprives plaintiffs of their sole

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[2] The preemption provision contains a "local hazard" exception, which preserves state authority at crossings where specific local safety hazards can be identified. However, *Easterwood* made clear that the local hazard exception only applies to "unique local conditions" and does not apply to broader categories, such as a class of crossings with similar characteristics. 507 U.S. at 675.

remedy. This case presents that very possibility, and warrants a fresh examination of the intended scope of the federal regulations at issue.

In undertaking that examination, several well-established background principles must be kept in mind. First, where preemption would leave injured individuals without any state or federal remedy, a court may find preemption only in the most compelling circumstances. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). This Court has recognized the validity of state tort remedies in areas involving particular hazards to human health, even where extensive federal regulations exist. *Silkwood* (nuclear power); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (medical devices). The heavy federal regulation of rail transportation demonstrates its hazardous nature.[3] Barring railroad victims from compensation would "have the perverse effect of granting complete immunity from . . . liability to an entire industry that, in the judgment of Congress, needed more stringent regulation. . . ." *Medtronic*, 518 U.S. at 487.

Furthermore, when considering preemption by regulation, courts should be reluctant to preempt state law without evidence of a very clear and specific intent, since agencies typically address topics in detail. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). *See also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,

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[3] *See* 49 C.F.R. §§ 200-399.

142 (1963) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'") Absent any express statement, the Court should not interpret the regulations to abrogate tort claims.

B. FEDERAL REGULATIONS DO NOT COVER THE SUBJECT MATTER OF RAILROADS' DUTY TO PROVIDE ADEQUATE WARNING DEVICES.

Under 49 U.S.C. § 20106, state law can be preempted when the Secretary of Transportation promulgates a regulation "covering the subject matter" of that law. This Court has interpreted the § 20106 term "covering" as a restrictive term "which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664. The Court added, "The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665.

The core legal issue in this case is whether 23 C.F.R. § 646.214 "cover[s] the subject matter" of railroads' state law duty to provide adequate warning devices. It does not. To find otherwise would be contrary to the structure and purpose of the federal grant program and would lead to inimical results that should be read into a regulation only when the language unequivocally mandates such a reading.

1. The Federal Regulations at Issue Only Limit the Use of Federal Funds; They Do Not Speak to or Cover Railroads' Independent Duty of Care.

a. Subsections 646.214(b)(3) and (4) are limited to the requirement that where federal funds are used, and specified site conditions exist, certain warning devices must be installed. There is no basis to conclude that their scope extends to eliminating railroads' common law duty at railway-highway grade crossings. In contending otherwise, Norfolk Southern insists that any decision guided by the federal program is a duty removed from the railroads and therefore "covered" by the regulation. This view erroneously conflates two separate concepts: A railroad's duty under the federal program and a railroad's duty at a crossing.

It is a basic tenet of the common law of railroad negligence that railroads' duty of care is a concept independent of and extending beyond requirements imposed by statute, administrative rule, or order. "[T]he fact that statutory requirements are fully complied with does not prevent a finding by the jury that the railroad was negligent in not providing additional warnings or signals." 65 Am. Jur. 2d § 509 (1972). *See also Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (Compliance with statute does not relieve railroad from taking additional precautions necessary for crossing safety). Consistent with this principle, railroad companies' duty of care at individual crossings exceeds the scope of the funding regulation. A program that funnels federal dollars to states for implementation of certain safety devices is not equivalent to a

federal determination that railroads have no further, independent duty to warn citizens at those crossings.

The regulation only addresses the responsibility of federal funds recipients to place a certain level of protection with federal money. *See* 23 C.F.R. § 646.200 (The purpose of the regulations is "to prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities.") This scope is much narrower than the duty of a railroad to ensure that its crossings are safe for the traveling public. That duty includes an independent judgment of the safety devices necessary at each individual crossing, given the particular characteristics of each crossing.

In order for Norfolk Southern to maintain that the regulation removes railroads' common law duty to install necessary safety devices at federally funded crossings, it would have to demonstrate that the regulation actually prevents railroads from doing so. No such showing can be made. To the contrary, the plain text of the regulation clearly envisions that railroads will be involved in the selection and installation process. *See, e.g.*, 23 C.F.R. § 646.214(b)(4) ("For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, *and/or the railroad*, is subject to the approval of FHWA") (emphasis added); 23 C.F.R. § 646.204 (defining "diagnostic teams," which guide device selection pursuant to § 646.214(b)(3), as "a group of knowledgeable *representatives of the parties of interest* in a railroad-highway crossing or a group of crossings.") (Emphasis added).

Even for crossings where the railroad was not involved in device selection, there is no evidence that the railroad is prohibited from exercising its duty, where necessary, to place safety devices at federally funded crossings. On its face, the regulation does not circumscribe railroad action. The only action preempted by the regulation is the use of federal funds to install lesser safety devices than those prescribed. The regulation does not prevent, either explicitly or implicitly, the railroad from placing safer devices at crossings which have received federal money.

Railroads' ability to provide their own safety devices is borne out in reality. At trial, state crossing program officials from both Tennessee and Georgia testified that railroads were permitted unilaterally to place safety devices at crossings, even where federal funds had already been expended. Mr. William Cantrell, administrator of Tennessee's minimum protection and priority listing programs (J.A. 98), testified that if Norfolk Southern had offered to erect gates and lights at the Oakwood Church Road crossing with its own funds, "We would have taken that deal in a heartbeat." J.A. 108-109. Mr. Archie Burnham, a retired Georgia transportation official and former chair of a national rail highway grade crossing committee (J.A. 70), also testified that the Georgia Department of Transportation would accept such an arrangement. "Certainly. The state will accept candidates that are not on their priority list if they're paid for with other funds than what the state has to pay." J.A. 97. Norfolk Southern itself has acknowledged this reality. In an introduction to its "Corporate Policy on Highway/Railway Crossing Safety," Norfolk Southern

President D.R. Goode stated, "[W]e must actively identify and correct crossing hazards on our lines." J.A. 124.

Where a railroad determines, through expertise gathered by its own inspection and monitoring, that existing devices are not sufficient to meet a common law standard of due care, the railroad must place additional safety devices at the scene. A railroad should not be permitted to endanger its employees, passengers, and highway motorists by allowing a known hazard with an insufficient level of protection to continue simply because the existing devices, undisputably minimal, were federally-funded.

b. Given the far-reaching and deleterious consequences that flow from Norfolk Southern's position, only the clearest of statutory or regulatory language would warrant its adoption. But not 23 C.F.R. § 646.214, the HSA, nor the FRSA contain language that addresses railroads' common law duties, let alone the elimination of those duties. Such silence is especially telling given that these laws provide no means for a victim injured at a railroad crossing to assert a claim in negligence and receive compensation from a tortfeasor. The FRSA provides a panoply of mechanisms through which to enforce railroad safety regulations, including civil penalties, injunctions, and compliance orders, 49 U.S.C. § 20111, with enforcement muscle provided by the Attorney General. 49 U.S.C. § 20112. Yet the FRSA does not address state common law claims nor provide a third party remedy for injured persons. And the HSA, as a federal Spending Clause program, speaks only to the conditions imposed upon states if they wish to receive the funds.

2. The Federal Regulations at Issue Do Not Cover the Subject Matter of the Scope of Railroads' Duty of Care at Crossings.

a. Norfolk Southern contends the FHWA regulations govern the matter of "adequacy of the [warning] devices" (Br. at 25), implicitly suggesting that the regulations establish a federal standard of care at crossings that supersedes any conflicting state regulation (common law or otherwise). Although § 646.214 uses the term "adequate warning devices," it does not purport to establish a standard of care, i.e., a level of protection which is "adequate" for purposes of discharging railroads' duty of care to the traveling public. The only definition of "adequate" supported by the §§ 646.214(b)(2) and (3) context is "of sufficient safety to warrant federal funding."[4]

It is apparent from its context that the term "adequate warning devices" does not establish a standard of care. The requirement for installation of "adequate warning devices" appears in the context of the federal funding program of §§ 214(b)(2) and (3). The provision states: "Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to *include* automatic gates with flashing light signals when one or more of the following conditions exist. . . ." 23 C.F.R. § 646.214(b)(3)(I) (emphasis added). The use of the word "include" indicates that in particular cases, gates and lights may not be, in and of themselves, "adequate." Thus, the regulations

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[4] Of course, in a proceeding to determine whether a railroad met a standard of due care, compliance with the federal standard would generally be relevant evidence.

expressly do not foreclose the possibility that further safeguards may be needed at a particular crossing to meet a railroad's standard of care.

In contrast, 23 C.F.R. § 646.214(b)(1), a much broader provision and the only subsection within § 646.214 that establishes an absolute requirement for federally funded crossings, expressly leaves open the possibility of stricter state standards. This subsection requires all "traffic control devices" to "comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways *supplemented to the extent applicable by State standards*." 23 C.F.R. § 646.214(b)(1) (emphasis added). The regulation plainly intends and expects that state law will impose additional duties at railroad crossings.

b. Standards set forth in a federal statute or regulation do not necessarily establish a negligence standard of care, because a common law standard of care can extend beyond the regulatory standard. A general regulation sets a floor below which protection may not drop, not a ceiling above which it may not rise. *California Federal Savings and Loan Assn. v. Guerra*, 479 U.S. 272, 280 (1987). *See also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985) ("[M]erely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.") This rule has been applied directly in the railroad safety context. *Grand Trunk Ry. v. Ives*, 144 U.S. 408, 421 (1892) (A statutory requirement does not

establish sufficient precautions, and additional safety devices must be provided to the extent necessary). In the case of §§ 646.214(b)(3) and (4), the regulation sets a floor. At a railroad crossing involving multiple main line railroad tracks, or a high speed train operation combined with limited sight distance, or any of the other 646(b)(3) conditions, anything less than automatic gates with flashing light signals would not be adequate and would not qualify for federal funding.

The individualized nature of railroad crossings further compels the conclusion that the general regulation cannot establish a standard of care. Unlike consumer products, for example, for which nationwide standards can be set, see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), every railway-highway intersection is different. Each has a different traffic pattern and differing levels of visibility, depending on factors such as terrain and nearby buildings, which can partially obscure lines of sight. An individual railroad crossing, with its particular circumstances, may well require more protective warning devices than those prescribed by a general regulation. Given the unique nature of each railroad crossing, it is implausible that Congress intended the Secretary of Transportation's regulations to establish a standard that would always and in every case be a sufficient level of safety to fulfill a railroad's duty of care.

Congress' stated purpose in enacting the Federal Railroad Safety Act of 1970 was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The federal goal of safety is

enhanced by state tort liability which gives railroads an incentive to upgrade their crossings.

Railroad engineering is continually developing improvements in the area of crossing safety. In addition to gates and lights, crossings may be equipped with double gates, highly reflectorized signs (against which the passage of a train creates an eye-catching "strobe" effect), cantilevering (extending lights on posts over traffic lanes), and traffic signal preemption (which links traffic semaphores to crossings so a train's approach triggers a red light for motorists). Indeed, under its "sealed corridor" program, the State of North Carolina is currently installing crossing devices that are more protective than gates and alarms. The program is designed to prevent motorists from trying to "beat the train," and includes placement of median barriers with posts, extra-long gate arms, and four-quadrant gates, in which gates are placed across both lanes of traffic on both sides of the intersection.[5] These innovations are not preempted by the federal law; in fact, they are encouraged and funded by the federal Department of Transportation. However, under the immunity requested by Norfolk Southern, railroads would lose all incentive to implement new technologies and continue making crossings safer.

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[5] A description of this program is posted at the North Carolina Department of Transportation's web site at http://www.bytrain.org/safety.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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